TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 627

PUBLIC SERVICE COMMISSION OF MONTANA, TOM STOUT, THOMAS E. CAREY, ET AL., ETC., APPELLANTS,

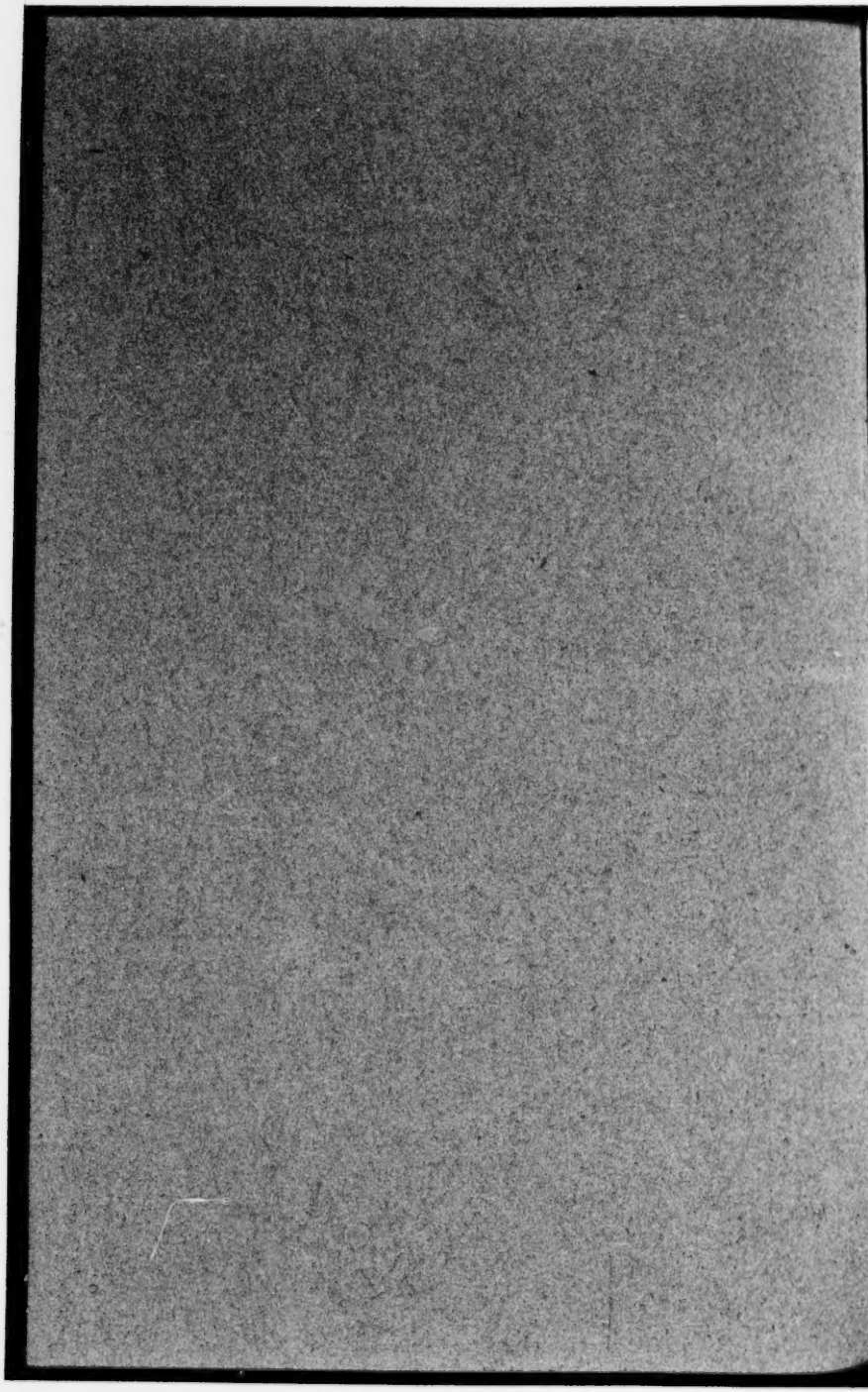
vs.

GREAT NORTHERN UTILITIES COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED JANUARY 14, 1933

(37,324)



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[fol. 3]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

GREAT NORTHERN UTILITIES COMPANY, Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, DAN BOYLE, LEE DENNIS, and LEONARD YOUNG, Members of said Commission, and L. A. Foot, Attorney General of the State of Montana, Defendants

BILL OF COMPLAINANT—Filed Dec. 22, 1930

To the Honorable the Judges of the District Court of the United States for the District of Montana:

Great Northern Utilities Company, a corporation, created, organized, and existing under and by virtue of the laws of the State of Montana, brings this, its bill of complaint, against the defendants above named, and thereupon complains and alleges:

I

That this is a suit of a civil nature, arising under the constitution of the United States, particularly under the Fourteenth Amendment thereto, and involves, exclusive of interest and costs, more than Three Thousand ($3,000.00) Dollars.

II

That the plaintiff is, and has been since prior to the year 1923, a corporation, organized and existing under and by virtue of the laws of the State of Montana.

[fol. 4] III

That the defendants, Dan Boyle, Lee Dennis and Leonard Young, are and have been since prior to the year 1928, the duly elected, qualified, and acting Railroad Commissioners of the State of Montana, and ex officio members of the Pub-

lic Service Commission of the State of Montana, and are residents and citizens of said State.

IV

That the defendant, L. A. Foot, is the duly elected, qualified, and acting Attorney General of the State of Montana, and a resident and citizen of said state.

V

That the Citizens Gas Company is and has been, since prior to the year 1928, a corporation, organized and existing under and by virtue of the laws of the State of Montana.

VI

That the city of Shelby is, and has been since prior to the year 1922, a municipal corporation, created, organized and existing under and by virtue of the laws of the State of Montana.

VII

That on the 16th day of October, 1922, the City Council of the City of Shelby passed an ordinance known and designated as Ordinance No. 82, which was approved by the Mayor of said city, a copy of which is hereto attached and made a part of this bill of complaint as Exhibit "A".

VIII

That thereafter and on the 2nd day of January, 1923, Forest P. Williams, the grantee named in said ordinance, sold, assigned and transferred to the plaintiff herein, the franchise granted by said ordinance and all rights, privileges, and benefits conferred thereby, and this plaintiff is now and ever since has been the owner thereof.

[fol. 5]

IX

That the franchise granted by said ordinance was, within ninety (90) days after the passage and approval thereof, accepted by the grantee therein named by filing with the City Clerk of the City of Shelby a writing expressly accepting said franchise, and the said Forrest P. Williams, plaintiff, and the herein — as his assignee and successor, have

duly performed all of the terms and conditions of said ordinance on the part of the grantee therein named to be kept and performed.

X

That this plaintiff, in the exercise of the franchise so granted, in the year 1923, constructed in the said City of Shelby a plant or system for furnishing and supplying natural gas to the said city and inhabitants thereof for lighting and heating purposes, and in the construction of said plant or system expended a large sum of money in excess of the sum of Fifty Thousand ($50,000.00) Dollars, and engaged in the business of furnishing and supplying natural gas in said city at rates approved by the Public Service Commission of Montana.

XI

That the City of Shelby has, and has had for the past year, a population of approximately 2500 people, and the plant or system so constructed by this plaintiff was designed and intended to supply natural gas to said city and all of its inhabitants in such quantities as then required and as might be required by the future population of said city, and said plant or system is of ample capacity to furnish such supply and this plaintiff now has and has had, ever since the commencement of the operation of its plant and system, an ample supply of natural gas for said city and its inhabitants and will continue to have such supply available for the present and future needs and requirements of all the people of said city.

[fol. 6]

XII

That on the 10th day of January, 1927, the City Council of said City passed an ordinance, designated and known as Ordinance No. 108, approved by the acting Mayor of said city, a copy of which is hereto attached and made a part hereof as Exhibit "B".

XIII

That the Citizens Gas Company, claiming to be the assignee of and to have succeeded to the franchise and all the rights, privileges and benefits granted and conferred by said Ordinance, No. 108, in the latter part of the year 1928,

in the pretended exercise of said franchise, constructed a plant or system for the furnishing and supplying of natural gas for lighting and heating purposes in said city, which said plant or system is a duplication of the plant or system of this plaintiff to the extent of approximately two-thirds of the plant and system of this plaintiff, and was constructed and intended to serve and furnish natural gas to the patrons and customers of this plaintiff as well as others who would become patrons and customers of this plaintiff except for the construction of said competing system or plant. Said Citizens Gas Company is continuously enlarging and extending its distribution system and will continue to do so until its system will be a complete duplication of the system of this plaintiff.

XIV

That the said gas plant or system of the Citzens Gas Company was constructed and is being operated in competition with the plant or system of this plaintiff, and said Commission has approved or concurred in a schedule of rates for the furnishing and supplying of gas from said plant or system proposed by said Citizens Gas Company, as follows:

			Net
First	10,000 cubic feet per month	35c	per M. cu. ft.
Next	10,000 " " " "	30c	" " " "
Next	30,000 " " " "	27½c	" " " "
Next	250,000 " " " "	25c	" " " "
All over	300,000 " " " "	22½c	" " " "

[fol. 7]

XV

That the population of said City of Shelby and the demands for natural gas therein are wholly insufficient to support and maintain both of said plants or systems, and such condition will continue indefinitely in the future, all of which was well known to said Citizens Gas Company prior to and at the time of the construction of its plant or system. That said Citizens Gas Company, knowing that it could not survive and continue to operate without securing for itself the patrons and customers of this plaintiff, proposed and had approved a schedule of rates, as aforesaid, and thereby and through solicitation prevailed upon and induced more than 100 of the patrons and customers

of this plaintiff to cease purchasing gas from this plaintiff and become its patrons and customers.

XVI

That at the time of the construction and operation of said system by said Citizens Gas Company, this plaintiff was supplying and furnishing gas to the people of said city in quantities desired, according to a tariff or schedule of rates, approved by said Public Service Commission, as follows:

		Net
First	10,000 cu. ft. per month per meter	50c per M. cu. ft.
Next	10,000 cu. ft. per month per meter	45c per M. cu. ft.
Next	30,000 cu. ft. per month per meter	40c " " " "
Next	250,000 cu. ft. per month per meter	35c " " " "
All over	300,000 cu. ft. per month per meter	30c " " " "

Minimum Bill: $1.50 per month per meter.
Prompt Payment discount: None.

XVII

That the said Citizens Gas Company commenced the operation of its plant or system and the distribution of natural gas in said city in the month of October, 1928, and at that time this plaintiff was furnishing and supplying natural gas to 485 customers or patrons, and within a brief period after the Citizens Gas Company commenced the operation of its plant or system and the furnishing and distribution of gas at the rates approved by the Public Service Commission of [fol. 8] Montana as aforesaid, 137 of the patrons or customers of this plaintiff ceased to purchase gas from this plaintiff and became patrons or customers of the said Citizens Gas Company.

XVIII

That this plaintiff, to prevent the loss of all of its customers or patrons, and to protect and preserve its investment in its gas plant or system, on the 8th day of November, 1928, proposed and filed with the Public Service Commission a tariff or schedule of rates, providing 25¢ per thousand cubic feet for all consumption up to three hundred thousand (300,000) cubic feet, and 20¢ per thousand cubic feet for all quantities over three hundred thousand (300,000) cubic feet, and on November 19, 1928, this plaintiff proposed and filed with said Public Service Commission a

tariff or schedule of rates, designated by said Commission as "Schedule 4-A", providing 20¢ per thousand cubic feet up to three hundred thousand (300,000) cubic feet and 15½ per thousand cubic feet for all over three hundred thousand (300,000) cubic feet.

XIX

That, upon the filing of said Schedule 4-A, the Citizens Gas Company presented to and filed with said Public Service Commission a complaint and protest against said Schedule 4-A, upon the grounds that the rates thereby proposed were "unfair, unjust and unreasonable" to said company. That a hearing was ordered and held by the said Public Service Commission, upon its own motion, at the City of Shelby, on December 20, 1928, for the purpose of determining the reasonableness and justness of the rates proposed by this plaintiff by said schedule, designated as Schedule 4-A. At said hearing the citizens Gas Company and twelve customers or patrons of said company appeared claiming and contending that said rates so proposed were not remunerative or proposed in good faith but as competitive rates. This plaintiff presented evidence in support and justification of said rates under the said conditions [fol. 9] and circumstances, then existing in the City of Shelby, and thereafter, and on January 22, 1929, the said Public Service Commission, Commissioner Young dissenting, made and issued its order, a copy of which is hereto attached and made a part hereof as Exhibit "C".

XX

That said Commission was and is without authority or jurisdiction to fix or establish such minimum rates or to require this plaintiff to adopt or charge rates according to the schedule provided in said order and thereby increase the rates specified in "Schedule 4-A", which rates this plaintiff was, at the time of the making of said order and ever since has been, charging, and the effect of said order is to deprive this plaintiff of the right of competition, for the purpose of retaining its patrons and customers and for the protection and preservation of its investment in said gas plant or system, and to deprive this plaintiff of its property, consisting of said gas plant and system and

of its right and liberty to contract for the furnishing of gas at the rates prescribed in "Schedule 4-A", without due process of law and to deny plaintiff equal protection of the law, all in violation of the Fourteenth Amendment of the Constitution of the United States.

XXI

That said Commission, in making and promulgating said order, acted without jurisdiction in that there was no evidence introduced before or considered by said Commission showing or tending to show that the rates prescribed thereby are just or reasonable, or that the rates prescribed in said Schedule 4-A are unjust or unreasonable and said order was made arbitrarily and capric-ously, without regard to the public interest and in the interest of and for the purpose of increasing the earnings and enhancing the value of the property of the said Citizens Gas Company, all in violation of the due process of law clause of the said Fourteenth Amendment.

[fol. 10] XXII

That plaintiff has not complied with said order and refuses to comply therewith unless it should be determined and decided in this court that said order is valid and that this plaintiff should comply therewith, in which event this plaintiff will do so unless said Commission, upon a showing then made, approve of rates different from those provided in said order.

XXIII

That the defendants threaten to and will, unless enjoined and restrained from so doing, institute and prosecute actions or proceedings in the courts of said state to enforce compliance with said order of this plaintiff, and for the collection from this plaintiff of the penalties provided for by Section 3908 of the Revised Codes of Montana of 1921.

XXIV

That the penalties provided by said Section 3908 for failure to obey said order by charging the rates therein prescribed are so large and severe that unless the collection

of same is enjoined, plaintiff would be compelled to obey said order, notwithstanding it is convinced that the rates prescribed thereby will ultimately be adjudged and decreed to be unlawful by reason whereof said section denies plaintiff the equal protection of the law and deprives it of its property without due process of law, in violation of said Fourteenth Amendment.

XXV

That the provisions of Section 3906 of the Revised Codes of Montana of 1921 providing that all rates fixed by the Commission shall be deemed reasonable and just and shall remain in full force and effect until final determination of their invalidity by the courts having jurisdiction is in violation of the Fourteenth Amendment to the Constitution of the United States in that the same deprives the plaintiff [fol. 11] of its property and of its right and liberty of contracting for the furnishing of gas, pending the determination of the validity of said rates presented by said order, without due process of law and denies to this plaintiff the equal protection of the laws.

XXVI

That said Commission refused to concur in the rates prescribed in said Schedule 4-A and in so refusing assumed to exercise the power conferred by the provisions of Section 3891 of the Revised Codes of Montana of 1921, declaring "that no advance or reduction of the existing schedules shall be made without the concurrence of the Commission". This provision is violative of the due process of law clause of the Fourteenth Amendment for the reason that it authorizes the Commission arbitrarily and without notice or a hearing or any opportunity for a hearing to refuse to concur in rates less than the rates prescribed by or approved by said Commission, as just and reasonable rates and Section 3892 of said Codes makes it unlawful for this plaintiff to charge, demand, collect or receive a greater or less compensation for any service performed than the rates prescribed by or approved by said Commission.

XXVII

That if said Commission has been authorized or empowered to prescribe minimum rates, or to require the increase

of rates which are less than just and reasonable rates, such authorization is in violation of the due process of law clause of the Fourteenth Amendment for the reason that there are no rules or principles prescribed governing or controlling such Commission in the fixing or determination of such minimum rates, or any rates other than just and reasonable rates, and said order deprives this plaintiff of its property and right and liberty to contract for the furnishing of gas as hereinbefore alleged.

XXVIII

That plaintiff has no plain, speedy or adequate remedy in the ordinary course of the law.

[fol. 12] Wherefore plaintiff prays:

1. That it be adjudged and decreed that the said order and the rates prescribed thereby are illegal and void, as being in violation of the Fourteenth Amendment of the Constitution of the United States, and also in violation of the Public Service Commission Act of Montana.

2. That a writ of preliminary or interlocutory injunction, affective during the pendency of this suit, issue, directed to the said defendants, and each of them, enjoining and restraining them from bringing any action or proceeding whatsoever, to compel obedience to said order by this plaintiff, and also enjoining and restraining them from instituting any action or proceeding to subject this plaintiff to the penalties provided in said Section 3908, or any other statute or law of the State of Montana, for failure to comply with said order, and further enjoining and restraining said defendants from in any manner preventing or interferring with the plaintiff in charging and collecting any rates for gas, not discriminatory, less than the rates prescribed by said order.

3. That a temporary restraining order issue enjoining and restraining the defendants, and each of them, as aforesaid, pending the determination of the application herein for an interlocutory injunction.

4. That upon final hearing, such injunction be made perpetual.

5. That the plaintiff may have all other, proper and equitable relief.

6. That this Honorable Court grant to plaintiff a writ of subpoena to be directed to each of said defendants, commanding them, and each of them, to appear on a day certain [fol. 13] and make answer to this complaint, (but not under oath, answer under oath being expressly waived), and to abide the further order of the court.

Dated this 22nd day of December, A. D. 1930.

Great Northern Utilities Company, by E. G. Toomey,
M. S. Gunn, Gunn, Rasch, Hall & Gunn, Solicitors.

Duly sworn to by H. M. Saubert. Jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

Ordinance No. 82

An ordinance granting to Forrest P. Williams, his associates and assigns, the right to construct, maintain and operate a plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas and to use the streets, alleys and public places of the city of Shelby therefor.

Be it ordered by the Town Council of the Town of Shelby, Montana:

Section 1. That there be and hereby is granted to Forrest P. Williams, his associates and assigns, hereinafter called the grantee, the right, franchise and privilege for and during the term of forty (40) years from date of the passage and approval of this Ordinance to erect, construct, maintain and operate a complete plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas within the corporate limits of the Town of Shelby, Montana, including each and every addition thereto and the right to excavate and to lay pipes and any necessary appli-

ances for the proper distribution of gas of whatsoever kind in and through all streets, alleys, and public places of the said Town of Shelby, and such additions thereto, or through any extensions of said streets, alleys and public places, and to do all things incident thereto or necessary therefor.

Section 2. All pipes for the distribution of gas shall be so placed and constructed as to not unnecessarily interfere with sewers and water mains. Any excavations made for the purpose of construction, laying, maintaining, replacing, taking up or repairing any underground structures of the grantee, shall be refilled and resurfaced to at least as good condition as prior to such excavation.

Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine.

Section IV. The grantee herein shall within ninety (90) days from and after the passage and approval of this franchise, file with the City Clerk a writing expressly accepting this franchise.

Section V. The rights, powers and franchises herein contained shall exist and continue in force and effect for a period of forty (40) years from date of the passage and approval of this ordinance.

Section VI. That it is herein further ordered and ordained by the said City Council that the City Engineer of Shelby, Montana, designate the location of the gas mains and laterals in the streets and alleys within the incorporated limits of the said City of Shelby.

Section VII. This Ordinance and franchise shall take effect and be in full force from and after its passage and approval in the manner provided by law.

Passed and approved this 16th day of October, A. D. 1922.

James A. Johnson, Mayor.

[fol. 15] EXHIBIT "B" TO BILL OF COMPLAINT

Ordinance No. 108

An ordinance granting to the Shelby Oil and Gas Company, its associates and assigns, the right to construct, maintain and operate a plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas and to use the streets, alleys and public places of the city of Shelby therefor.

Be it ordained by the City Council of the City of Shelby, Montana:

Section I

That there be and hereby is granted to the Shelby Oil & Gas Company, its associates and assigns, hereinafter called the grantee, the right, franchise and privilege for and during the term of Forty (40) years from date of the passage and approval of this Ordinance to erect, construct, maintain and operate a complete plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas within the corporate limits of the City of Shelby, Montana, including each and every addition thereto and the right to excavate and to lay pipes and any necessary appliances for the proper distribution of gas of whatsoever kind in and through all streets, alleys and public places of the said City of Shelby, and such additions thereto, or through any extensions of said streets, alleys and public places, and to do all things incident thereto or necessary therefor.

Section II

All pipes for the distribution of gas shall be so placed and constructed as to not unnecessarily interfere with sewers and water mains. Any excavations made for the purpose of construction, laying, maintaining, replacing, taking up or repairing any underground structures of the grantee, shall be refilled and resurfaced to at least as good condition as prior to such excavation.

Section III

The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine.

Section IV

The grantee herein shall within ninety (90) days from and after the passage and approval of this franchise, file with the City Clerk a writing expressly accepting this franchise.

Section V

The rights, powers and franchises herein contained shall exist and continue in force and effect for a period of forty (40) years from date of the passage and approval of this ordinance.

Section VI

That it is herein further ordered and ordained by the said City Council that the City Engineer of Shelby, Montana, designate the location of the gas mains and laterals in the streets and alleys within the incorporated limits of the said City of Shelby.

Section VII

This Ordinance and franchise shall take effect and be in full force from and after its passage and approval in the manner provided by law.

Passed and approved this 10th day of January, A. D. 1927.

H. G. Syster, Acting Mayor.

[fols. 16 & 17] Exhibit "C" to Bill of Complaint

Order

At a session of the Public Service Commission of Montana, held in its office in the Capitol, Helena, Montana, Tuesday, January 22, 1929, present Chairman Boyle and Commissioners Young and Dennis, there regularly came

before the Commission for final action the matters and things involved in Dockets Nos. 991 and 1028, and it appearing that the Commission has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all matters and things involved have been duly investigated, and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Commission being fully advised in the premises,

It is ordered that Schedule 4-A, sheet 2, filed by the Great Northern Utilities Company with the Commission on November 19, 1928, stating rates for natural gas service available for all classes of service at Shelby, Toole County, Montana, be not concurred in and that said Schedule 4-A, sheet 2, shall be, and it is hereby disapproved and rejected.

It is further ordered that the Great Northern Utilities Company shall on or before the first day of February, 1929, file with the Commission a Schedule of rates for natural gas service at Shelby, Montana, effective as of February 1, 1929, and until further order of the Commission, which schedule of rates shall be embodied in a tariff known as Tariff No. 4, as follows, to-wit:

First	10,000	cubic	feet	per	month	35c	per	M.	cu.	ft.
Next	10,000	"	"	"	"	30c	"	"	"	"
Next	30,000	"	"	"	"	27½c	"	"	"	"
Next	250,000	"	"	"	"	25c	"	"	"	"
All over	300,000	"	"	"	"	22½c	"	"	"	"

Minimum Bill: $1.50.

It is further ordered that the Secretary shall serve a true copy of this report and order upon each of the parties hereto, and that the same shall be in full force and effect forthwith according to its terms.

Daniel Boyle, Chairman; Lee Dennis, Commissioner, Being and Constituting a Majority of the Public Service Commission of Montana.

Attest, official: Francis A. Silver, Secretary. (Seal.)

Commissioner Young: I dissent. I can not agree with the majority in ordering in the above rates. I am not concerned about the so-called "rate war" in Shelby but am interested in obtaining the very best rates for the consumers, and when a utility voluntarily reduces its rates, as in this instance, I am in favor of giving the customers the bene-

fit of the reduction instead of denying them the relief offered. In my humble opinion, the Public Service Commission Law was not passed to prohibit rate reductions. Therefore, I wish to be recorded as voting for the approval of Schedule 4-A proposed by the utility naming 20 cents per M. cubic feet for the first 300,000 cubic feet, and 15 cents per M. cubic feet for all over, which is almost one hundred per cent lower than the rates ordered established by the majority of the commission.

Leonard C. Young, Commissioner.

[File endorsement omitted.]

[fols. 18 & 19] In United States District Court

Motion to Dismiss Bill of Complaint—Filed Jan. 15, 1931

Come now the Public Service Commission of Montana, Dan Boyle, Lee Dennis and Leonard Young, members of and constituting said Public Service Commission of Montana, and L. A. Foot, as Attorney General of the State of Montana, defendants above-named, and move the Court to dismiss the bill of complaint on file herein on the grounds and for the reasons that the said bill of complaint does not state facts sufficient to constitute a valid cause of action, in equity, or at all.

L. A. Foot, Attorney General of the State of Montana, residing at Helena, Montana; Francis A. Silver, Attorney for the Public Service Commission of Montana, residing at Helena, Montana, Attorneys for Defendants.

Service of the above and foregoing motion to dismiss admitted and receipt of a copy thereof acknowledged this 15 day of January, 1931.

E. G. Toomey, M. S. Gunn, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 20] In United States District Court

Answer—Filed June 29, 1931

Come now the Public Service Commission of Montana, Dan Boyle, Lee Dennis, and Leonard Young, members of

said Commission, and L. A. Foot, Attorney General of the State of Montana, defendants above named, and for answer to the bill of complaint on file herein, admit, deny, and allege:

I

Admit the allegations contained in paragraphs II, III, IV, V, VI, VII, VIII, X, XII, XIV, XVI, XVII, and XXII.

II

Deny that the above-entitled suit arises under the Constitution of the United States or any amendment thereto or involves, exclusive of interest and costs, more than Three Thousand ($3,000.00) Dollars.

III

With reference to paragraph IX of the bill of complaint, admit that the franchise granted by the City of Shelby was accepted by the grantee therein named but except as herein specifically admitted, the defendants deny each and every and all allegations contained in said paragraph IX.

IV

With reference to paragraph XI of the bill of complaint, the defendants say that they believe the allegations thereof to be true.

V

With reference to paragraph XIII of the bill of complaint, the defendants admit that the Citizens Gas Company did, during the latter part of 1928, pursuant to [fol. 21] Ordinance No. 108 of the City of Shelby, Montana, construct a system for furnishing and supplying natural gas to the City of Shelby and the inhabitants thereof for lighting and heating purposes in said city, but as to the other allegations contained in said paragraph XIII, not herein specifically admitted, the defendants allege that they, and each of them, are without knowledge thereof.

VI

As to the allegations contained in paragraph XV of said Bill of Complaint, the defendants, and each of them, allege that they are without knowledge thereof.

VII

As to paragraph XVIII of the bill of complaint, the defendants admit that the plaintiff proposed and filed with the Public Service Commission of Montana the tariffs set forth in said paragraphs, but with respect to other allegations contained in said paragraph, not herein specifically admitted, the defendants, and each of them, allege that they are without knowledge thereof.

VIII

That with respect to the allegations of paragraph XIX of the bill of complaint, the defendants admit that the Citizens Gas Company filed with said Public Service Commission of Montana a complaint and protest as in said paragraph XIX alleged, but in connection therewith the defendants allege that the said complaint of said Citizens Gas Company was by the Public Service Commission of Montana denied and no hearing of any kind or character was held or had thereon; admit that the Public Service Commission of Montana, upon its own motion, held a public hearing at Shelby, Montana, on December 20, 1928, to in- [fol. 22] quire into the reasonableness and justness of the rates proposed by plaintiff in its Schedule 4-A and that at said hearing the Citizens Gas Company and twelve (12) customers thereof appeared before the said Public Service Commission of Montana and contended that said rates proposed by plaintiff were not proposed in good faith; admit that plaintiff presented evidence to said Public Service Commission of Montana; admit that on January 22, 1929, the said Public Service Commission of Montana made and issued its Report and Order, and that the copy of the order attached to bill of complaint herein and marked Exhibit "C" is a true and correct copy of the order, except that the report of the Commission issued in connection with said order and which is made a part thereof is not set forth as a part of Exhibit "C"; but except as hereinabove specifically admitted, the defendants deny each and every and all allegations contained in said paragraph XIX.

IX

The defendants deny that the Public Service Commission of Montana was on said January 22, 1929, or now is

without authority or jurisdiction to fix or establish minimum rates or to require the plaintiff to adopt or charge rates according to the schedules provided in said report and order; deny that the affect of said order is to deprive plaintiff of the right of competition, and deny that plaintiff, as a public utility, has the right of competition; deny that the affect of said order to to deprive the plaintiff of the property or its right and liberty to contract without due process of law or to deny plaintiff equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States or a violation of any other provision of the Constitution of the United States, or at all.

[fol. 23] X

With reference to paragraph XXI of the bill of complaint, defendants deny that said Public Service Commission of Montana in making and promulgating said report and order acted without jurisdiction or that there was no evidence introduced before or considered by said Commission showing, or tending to show, that the rates prescribed are just and reasonable or that the rates proposed in said Schedule 4-A are unjust or unreasonable; deny that said report and order was made arbitrarily or capriciously or without regard to the public interests; deny that said report and order was made in the interest of or for the purpose of increasing the earnings or enhancing the value of the property of the said Citizens Gas Company.

XI

With reference to the allegations of paragraph XXIII of the bill of complaint, defendants admit that they threaten to and will, unless restrained from so doing, institute and prosecute actions or proceedings in the courts of the State of Montana to enforce compliance with said order but defendants deny that they, or either of them, threaten to or will institute and prosecute or institute or prosecute actions or proceedings in the courts of the State of Montana for the collection from plaintiff of the penalties provided for by section 3908 of the Revised Codes of Montana of 1921, during the pendency of any litigation instituted and prosecuted by the plaintiff in any court of competent jurisdiction to test the legality or lawfulness of said order; and in

this connection the defendants allege that at no time since the date of said order, to-wit: January 22, 1929, up to and including the date hereof, to-wit: June 29, 1931, have they, or either of them, instituted or prosecuted or threatened to institute or prosecute any action or proceeding in the courts of the State of Montana, or at all, for the collection [fol. 24] of any penalty or penalties provided for by section 3908 of the revised codes of Montana of 1921, and the defendants, and each of them, further allege that they do not intend to and will not institute or prosecute any action or proceeding in the courts of the State of Montana, or at all, for the collection of any penalty or penalties provided for by section 3908 of the Revised Codes of Montana accruing, or alleged to accrue, during the period elapsing between the effective date of said order, to-wit: February 1, 1929, and the final determination of the validity of said order by a court of competent jurisdiction.

XII

With reference to paragraph XXIV of the bill of complaint, defendants deny that section 3908, Revised Codes of Montana, 1921, denies the plaintiff the equal protection of the law or deprives it of its property without due process of law.

XIII

With reference to paragraph XXV of the bill of complaint, defendants deny that the provision of section 3906, Revised Codes of Montana, 1921, deprives the plaintiff of its property or its right or liberty of contracting for the furnishing of gas, pending the determination of the validity of said rates prescribed by said report and order, without due process of law or that it denies to the plaintiff the equal protection of the law.

XIV

With respect to paragraph XXVI of the bill of complaint, defendants admit that said Commission refused to concur in the rates prescribed in said schedule 4-A and in so refusing, assumed to exercise and did exercise the power conferred by the provisions of section 3891, Revised Codes of [fol. 25] Montana, 1921; deny that section 3891, or any part thereof, is violative of the due process of law clause

of the Fourteenth Amendment to the Constitution of the United States, or of any other provision of said Constitution; deny that said section 3891 authorized the Commission arbitrarily or without notice or hearing, or any opportunity for hearing, to refuse to concur in rates less than the rates prescribed by or approved by said Commission as just and reasonable rates; admit that section 3892 of Revised Codes of Montana, 1921, make it unlawful for the plaintiff, or any other public utility, to charge or demand or collect or receive a greater or less compensation for any service performed than the rates prescribed by or approved by the Public Service Commission of Montana.

XV

With respect to paragraph XXVII of said bill of complaint, defendants deny that the powers granted to said Commission by section 3891, Revised Codes of Montana, 1921, are in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States; and deny that said report and order deprives the plaintiff of its property or right or liberty to contract for the furnishing of gas to the public at Shelby, Montana.

XVI

With respect to paragraph XXVIII of said bill of complaint, defendants deny that the plaintiff is without plain, speedy, or adequate remedy in the ordinary course of the law.

XVII

Except as hereinabove specifically admitted, denied, or qualified, these answering defendants deny specifically each and every and all other allegations contained in said bill of complaint.

[fols. 26 & 27] Wherefore the defendants pray that the bill of complaint herein be dismissed and that they, and each of them, go hence without day.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Attorneys for Defendants, residing at Helena, Montana.

Service of the above and foregoing answer admitted and receipt of a copy thereof acknowledged this 29th day of June, 1931.

Gunn, Rasch, Hall & Gunn, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 28 & 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Sept. 19, 1932

This cause came on regularly for final hearing this day, Mr. M. S. Gunn and Mr. E. G. Toomey appearing for the plaintiff, and Mr. Francis A. Silver appearing for defendants.

Thereupon Mr. Gunn presented to the court a proposed amendment to the complaint herein and moved that the same be allowed, to which proposed amendment Mr. Silver objected in behalf of the defendants. Thereupon the court stated that said proposed amendment would be considered by the court when making up its decision and that an exception would be allowed the parties to any adverse ruling made by the court.

Thereupon Mr. Silver moved the court to rule on the objections made by the defendants during the taking of testimony before the Examiner at Shelby, Montana, on September 12, 1932, whereupon the court stated that no ruling would be made at this time but that the said objections would be considered by the court in making up its decision, and that an exception would be allowed the parties to any adverse ruling of the court.

Thereupon, it was agreed by counsel that certain corrections be made in the transcript of testimony taken before the Examiner, whereupon the court directed that leave be granted counsel to make the corrections by interlineation, and initial them so the court may have a correct record.

Thereupon the cause was argued by counsel and submitted and by the court taken under advisement, the parties

being granted leave to submit copies of their brief before the Supreme Court of the United States.

Court thereupon suspended until such time as the further business of the court shall again require it to resume.

C. R. Garlow, Clerk, by H. H. Walker, Deputy.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

Herein opinion this day rendered and filed; the clerk will note plaintiff's exception to amendment denied and defendants' to objections to evidence overruled.

[fol. 31] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

No. 1060

GREAT NORTHERN UTILITIES CO., Plaintiff,

vs.

PUBLIC SERVICE COMMISSION et al., Defendants

Before Sawtelle, Circuit Judge, and Pray and Bourquin, District Judges

OPINION—Filed Oct. 5, 1932

BOURQUIN, District Judge:

Heretofore, an interlocutory injunction was awarded plaintiff against the defendant commission's rate order found unreasonable for that (1) at rates affording fair return the field is insufficient for more than one utility, in consequence of which plaintiff's right to compete with a rival to the survival of the stronger if not the fitter, can not be legally divested by the minimum rate by the order prescribed, and/or (2) the prescribed rates do not afford fair return. See 52 Fed. (2) 802.

Affirmance by the Supreme Court is "without prejudice to the consideration and determination at final hearing of all questions of law and fact, including the question of the reasonableness, in the circumstances disclosed, of the order which is the subject of the suit." See 285 U. S. 524.

At this final hearing the evidence, objections to which are overruled, varies little if any from that at the former hearing, and discloses the facts, circumstances and situation are unchanged.

Likewise are our views and findings, which together with pleadings and evidence sufficiently appear at 52 Fed. (2) 802, and without more the injunction is made permanent.

It may be observed that plaintiff's proposed amendment to its complaint in substance that the commission's rates will not afford fair return and are confiscatory, opposed by defendants, is unnecessary and disallowed.

[fols. 32 & 33] The fact was recognized by defendants from the beginning, they declared it in their report of which the order is a part, and conceded it throughout save in so far as by belated and strategic answer, uselessly compelling this second final hearing, they deny the knowledge of insufficiency of the field which their report discloses they in fact had. If now an issue, the pleadings suffice to present it, necessarily involved in "the question of the reasonableness, in the circumstances disclosed, of the order" in suit. Decree accordingly.

[File endorsement omitted.]

[fol. 34] In United States District Court

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Oct. 15, 1932

This cause came on to be further heard at this term upon the application of defendants at Helena, Montana on September 19, 1932, and the court having considered the pleadings and proof, including the evidence and exhibits received at the hearing in Shelby, Montana on September 12, 1932, before an Examiner for the Court, and the arguments

of counsel and the briefs submitted, and now being fully advised in the premises, makes the following

Findings of Fact

1. That the gas plant and system of Citizens Gas Company at Shelby, Montana is, substantially, a duplication of the gas plant and system of the plaintiff company.

2. That the community of Shelby, Montana is insufficient to support and maintain, at rates affording fair return, the competing gas plants and systems therein installed and operated.

3. That the rates prescribed by the Commission for the plaintiff company deprive it of the right of competition, which right plaintiff has in the circumstances disclosed and said rates, if applied to plaintiff's operations, would destroy its property.

4. That, in any event, the rates prescribed by the defendant Commission would, if applied to plaintiff's operations, fail to produce legitimate operating expenses, taxes, depre-
[fols. 35 & 36] ciation and a fair return upon the fair value of plaintiff's property.

And from the foregoing the court now makes the following:

Conclusions of Law

1. That Report and Order No. 1530 of the defendant Commission, promulgated January 22, 1929, and complained of in the complaint herein, is invalid.

2. That the interlocutory injunction heretofore granted herein should be made permanent.

Decree accordingly.

Bourquin, District Judge for the Court.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

GREAT NORTHERN UTILITIES COMPANY, Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, DANIEL BOYLE, Lee Dennis, and Leonard Young, Members of said Commission, and L. A. Foot, Attorney General of the State of Montana, Defendants

DECREE OF PERMANENT INJUNCTION—Filed Oct. 15, 1932

This cause came on to be further heard at this term before the specially constituted court—the Hon. William H. Sawtelle, Judge of the Circuit Court of Appeals for the Ninth Circuit, the Hon. Geo. M. Bourquin, and the Hon. Chas. N. Pray, District Judges in the District Court of the United States for the District of Montana—at Helena, Montana, on September 19, 1932, upon the application of defendants, and was argued by counsel; and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed, and this does order, adjudge, and decree, that the order complained of herein is null and void and the interlocutory injunction heretofore issued herein is hereby made permanent and, accordingly, the defendants, and each of them, and all persons acting in aid or assistance of them, shall be, and they are hereby permanently enjoined and restrained from enforcing the said order complained of, a copy of which is made a part of the Bill of Complaint herein and from, in any manner, interferring with the plaintiff in charging and collecting rates for natural gas furnished through its gas plant or system in Shelby, Montana, less than the rates prescribed by said order.

It is further ordered, adjudged and decreed that plaintiff [fols. 38 & 39] have and recover its costs herein expended and incurred, amounting to the sum of — ($—).

Done and dated this 15th day of October, 1932.

Bourquin, District Judge, for the Court.

[File endorsement omitted.]

[fols. 40 & 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 26, 1932

To the Honorable District Court of the United States, District of Montana, and to the Honorable Judges thereof:

The above-named Public Service Commission of Montana, Dan Boyle, Lee Dennis and Leonard Young, members of said Commission, and L. A. Foot, Attorney General of the State of Montana, defendants, and each and all of them, feeling aggrieved by the permanent injunction decree and order rendered and entered in the above-entitled cause on the 15th day of October, 1932, do, and each of them hereby does, appeal from said permanent injunction decree and order to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they, and each of them, pray that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said permanent injunction decree and order was based, duly authenticated, be sent to the Supreme Court of the United States, Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioners further pray that a proper order relating to the required security to be required of them be made.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Counsel for Defendants and Appellants, Residing at Helena, Montana.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Nov. 26, 1932

Come now Public Service Commission of Montana, Dan Boyle, Lee Dennis and Leonard Young, members of said

Commission, and L. A. Foot, Attorney General of the State of Montana, defendants in the above-entitled cause, and file the following assignment of errors upon which they will rely upon the prosecution of the appeal herewith petitioned for in said cause, from the permanent injunction decree and order made and entered in the above-entitled court and cause on the 15th day of October, 1932:

I

The United States District Court for the District of Montana erred in failing to grant the motion interposed by the defendants to dismiss the bill of complaint filed in the above-entitled cause on the ground that the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity, or at all.

II

The United States District Court for the District of Mon-
[fol. 43] tana erred in overruling the objections of the defendants herein to the introduction of any evidence on behalf of the complainant on the ground and for the reason that the bill of complaint herein does not state facts sufficient to constitute a cause of action in equity, or at all.

III

The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained or by plaintiff is null and void.

IV

The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained of by plaintiff is null and void because the record herein discloses that the specific, just, and reasonable schedule of rates prescribed by the defendant commission was made, issued, and promulgated to prevent ruinous competition in the premises, under the authority delegated to the defendant commission in Chapter 52, Laws of Montana, 1913 (Chap. 260, Part. III, Political Code, Revised Codes of Montana, 1921), as interpreted by the highest appellate

court of the State of Montana, to-wit: The Supreme Court of the State of Montana.

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained of herein.

VI

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein [fol. 44] permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained of herein, in that the records do conclusively show that the specific, just, and reasonable schedule of rates prescribed in said order is neither confiscatory nor discriminatory, but is higher than the schedule of rates being then and there charged by plaintiff, which latter schedule the plaintiff admitted to be insufficient to produce a reasonable return on the present value of its property used and useful in the public service and which schedule of rates plaintiff admitted compelled it to operate at a loss.

VII

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein, in that the evidence conclusively shows that the specific, just, and reasonable schedule of rates prescribed by the defendant commission was prescribed in the public interest and for the purpose of preventing the plaintiff and the other utility operating in the same field with plaintiff from destroying each other by ruinous competition.

VIII

The United States District Court for the District of Montana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has or possesses the right to engage in unrestricted competition with Citizens Gas Company, a public utility, engaged in serving the same general field as plaintiff, in the matter of rates or charges to be fixed or charged for the sale and distribution of natural gas to the public in Shelby, Montana.

IX

The United States District Court for the District of Mon-
[fol. 45] tana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has and possesses the right to engage in a rate-war at or in Shelby, Montana, with its competitor, Citizens Gas Company, a public utility.

X

The United States District Court for the District of Montana erred in failing and refusing to give due or any consideration to the right of the consumers of natural gas at Shelby, Montana, to have reasonably adequate, continuous, and uninterrupted natural gas service for domestic, commercial, and industrial uses in Shelby, Montana, from the public utilities therein engaged in selling and distributing natural gas.

XI

The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a public utility, had or has the right to disable itself by means of engaging in a rate war with Citizens Gas Company, a public utility, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom.

XII

The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a public utility, had or has the right to disable Citizens Gas Company, a public utility, by means of engaging it in a rate war, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom.

[fol. 46]

XIII

The United States District Court for the District of Montana erred in holding and finding that the evidence is suffi-

cient to prove the allegation of plaintiff's bill of complaint that the population of the city of Shelby, Montana, and the demands for natural gas therein are insufficient to support the public utility natural gas plants and systems of the plaintiff and the Citizens Gas Company, a Corporation, at Shelby, Montana.

XIV

The United States District Court for the District of Montana erred in holding and finding that the evidence presented established that the field served by plaintiff and the Citizens Gas Company, a corporation, as public uitilities in the sale and distribution of natural gas, to-wit: Shelby, Montana, is insufficient to support and maintain more than one of the said public utilities.

XV

The United States District Court for the District of Montana erred in holding and findings that the specific rates prescribed by the defendant commission for application in Shelby, Montana, will not afford a fair return to plaintiff upon the present fair valuation of its property used and useful in the public service.

XVI

The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and the Citizens Gas Company, a corporation, public utilties engaged in the sale and distribution of natural gas to the public at said Shelby, Montana.

[fol. 47] XVII

The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public uitilities, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana.

XVIII

The evidence presented is insufficient to support the finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and Citizens Gas Company, a corporation, public utilities engaged in the sale and distribution of natural gas to the public at said Shelby, Montana.

XIX

The evidence presented is insufficient to support the finding of the United States District Court for the District of Montana that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public utilities, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana.

XX

The evidence presented is insufficient to warrant the or any finding by the United States District Court for the District of Montana as to the reasonableness of the natural gas rates prescribed by the Public Service Commission of Montana for observance by plaintiff in its sale and distribution of natural gas to the public at Shelby, Montana.

[fol. 48]

XXI

The United States District Court for the District of Montana erred in holding that the pleadings presented an issue as to whether the rates prescribed by the defendant commission would yield a fair return to the plaintiff upon the present fair value of its property used and useful in the public service.

XXII

The United States District Court for the District of Montana erred in holding that the pleadings are sufficient to present the question of the reasonableness and justness of the rates prescribed by the defendant commission.

XXIII

The United States District Court for the District of Montana erred in failing to find the facts specially and to

state separately its conclusions of law thereon as is required by Rule 70½ of the Equity Rules promulgated by the United States Supreme Court June 2, 1930, to take effect October 1st, 1930.

XXIV

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to [fol. 49] the provisions of Chapter 52, Laws of Montana, 1913 (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921).

XXV

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to the express proviso contained in said franchise, as follows, to-wit: "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine," thereby waiving any right it might otherwise have to engage in a rate war with a competitor or to charge any rates or rate lower than a specific just and reasonable rate or rates prescribed by the Board of Railroad Commissioners of the State of

Montana in its ex officio capacity as Public Service Commission of Montana.

XXVI

The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the specific rate order of the defendant commission is confiscatory in that the Fourteenth Amendment to the Constitution of the United States does not guarantee to plaintiff a reasonable return on the present fair value of its property used and useful in the public service, but guarantees it merely an equal opportunity to secure such reasonable return, which equal opportunity was preserved to plaintiff in the premises by the minimum [fol. 50] or specific rate order promulgated by the defendant commission.

XXVII

The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the State must abdicate its regulating power when the field will not support two utilities because plaintiff entered the public utility field as a distributor and seller of natural gas at Shelby, Montana, without any exclusive right to so occupy said field and without any guarantee against competition.

XXVIII

The United States District Court for the District of Montana erred in engrafting an amendment upon Chapter 52, Laws of 1913 (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921), in conflict with the meaning and interpretation of said chapter as construed by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana.

XXIX

The United States District Court for the District of Montana erred in passing upon the issues involved herein in refusing to accept the construction placed upon Chapter 52, Laws of 1913 (Chapter 260, Part III, Political Code,

Revised Codes of Montana, 1921), by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana.

XXX

The United States District Court for the District of Montana erred in overruling defendants' objections to the testimony of plaintiff's witness E. R. Foster, stating the [fol. 51] conclusions drawn by said witness from plaintiff's exhibit No. 5, in substance to the effect that said exhibit No. 5 indicates that if the rate prescribed by the defendant commission had actually been charged during the periods covered by said exhibit No. 5, to-wit: January 1st, 1929, to July 31, 1932, both inclusive, the plaintiff would not have earned enough to pay operating expenses, including depreciation, and have left a net amount which would produce a fair return based upon the valuation found by said defendant commission.

XXXI

The United States District Court for the District of Montana erred in overruling the defendants' objections to the testimony of plaintiff's witness E. R. Foster, that the total revenue of plaintiff company for the calendar year 1929, applying the rates prescribed by the defendant commission would be $19,753.34.

XXXII

The United States District Court for the District of Montana erred in overruling defendants' objections to testimony of plaintiff's witness E. R. Foster, in substance to the effect that the plaintiff company would, for the calendar year 1929, fall $11,669.64 short of meeting the requirements fixed by the defendant commission after allowances for depreciation and return, if the total revenues of the plaintiff company were computed upon the basis of applying the rates prescribed by the defendant commission to the quantity of natural gas sold by the plaintiff company during the year 1929.

XXXIII

The United States District Court for the District of Montana erred in admitting in evidence on behalf of plain-

tiff over the objection and exception of defendants a document consisting of two pages, headed respectively: "Sheet 1, Great Northern Utilities Company, Gas Department [fol. 52] Only, Study of Allowance for Depreciation and Return, Based on Montana Commission Order #1530," and "Sheet 2, Great Northern Utilities Company, Gas Department Only, Study Showing Deficit for Three Years and Seven Months Based on Rate Found and Allowances for Depreciation and Return in Commission Order #1530, Together with Actual Operating Expenses from Company Records" (Plaintiff's Exhibit No. 5), and which reads as follows:

Sheet 1

		1929	1930	1931	1932 to July 31st
Value of property as of 1-1-28, p. 15, Commission order #1530	$43,214.22				
Net Additions during year 1928 from company records	3,964.88				
Total at first of year		$47,179.10	$47,573.44	$48,618.55	$48,790.73
Net additions during year		394.34	845.11	172.18	†534.60
Depreciation on Value at 1st of year as allowed in Commission Order #1530. (8% on all except Land at $1,300 plus Working Capital at $2,500)		$3,470.33	$3,501.88	$3,585.16	*$2,093.74
4% on net additions during year		15.77	33.80	6.89	†1.25
Total for depreciation		3,486.10	3,535.68	3,592.05	2,092.49
Return on Value at 1st of year as allowed in Commission Order #1530 (8%)		$3,774.33	$3,085.88	$3,889.48	*$2,276.90
4% on net additions during year		15.77	33.80	6.89	†1.25
Total for return		3,790.10	3,839.68	3,896.37	2,275.65
Total Sales, M. Cu. Ft		73,160.5	67,375.0	55,889.0	39,559.5
Depreciation per M. Cu. Ft.		$.0477	$.0525	$.0643	$.0529
Return " " " "		.0518	.0570	.0697	.0575

* Based on 7 months.

† Red in copy.

[fol. 53]

Sheet 2

	1929		1930		1931		1932 to July 31	
	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.
M. cu. ft. sold	73,160.5		67,375.0		55,889.0		39,559.5	
Expenses:								
Transmission and Distribution	$2,339.76	$.0320	$2,342.97	$.0348	$1,843.97	$.0330	$714.05	$.0181
Commercial	3,229.60	.0442	2,679.47	.0398	1,846.97	.0331	912.71	.0231
General	8,987.64	.1228	8,287.37	.1230	8,071.19	.1444	5,385.04	.1361
Undistributed	1,166.42	.0159	1,247.85	.0185	1,307.75	.0234	1,456.71	.0368
Taxes	1,702.54	.0233	1,007.14	.0149	1,002.18	.0179	606.25	.0153
Total	17,425.96	.2382	15,564.80	.2310	14,072.06	.2518	9,074.76	.2294
Cost of gas	6,750.82	.0923	5,388.99	.0800	5,399.28	.0966	3,816.80	.0965
Total expenses	24,176.78	.3305	20,953.79	.3110	19,471.34	.3484	12,891.56	.3259
Depreciation based on allowance by Montana Commission in Order # 1530	3,486.10	.0476	3,535.68	.0525	3,592.05	.0643	2,092.49	.0529
Fair return based on Montana Commission Order # 1530	3,790.10	.0518	3,839.68	.0570	3,896.37	.0697	2,275.65	.0575
Total Required Revenue	31,452.98	.4299	28,329.15	.4205	26,959.76	.4824	17,259.70	.4363
Estimate Revenue based on rate p. 26 of Commission Order # 1530 (Av. Price $27 per M. c. f.)	19,753.34	.2700	18,191.25	.2700	15,090.03	.2700	10,681.07	.2700
Deficit	11,699.64	.1599	10,137.90	.1505	11,869.73	.2124	6,578.63	.1663

XXXIV

The United States District Court for the District of Montana erred in admitting in behalf of plaintiff over the objection and exception of defendants a document headed, "Great Northern Utilities Company, Gas Department Only, Study Showing Application of Montana Commission Report and Order #1530 to Actual Sales of Gas for Past Three Years" (Plaintiff's Exhibit 6), and which reads as follows:

[fol. 54]

	Per M. cu. ft.			
	1929	1930	1931	1932 to July 31
Operating expenses exclusive of cost of gas purchased and depreciation allowance (p. 25 of Order #1530)	$.1354	$.1354	$.1354	$.1354
Actual cost of gas from company records.	.0923	.0800	.0966	.0965
Depreciation allowance at 8%, based on Commission Order (p. 25 of Order #1530)	.0476	.0525	.0643	.0529
Rate of return at 8% based on Commission Order (p. 26 of Order #1530)	.0518	.0570	.0697	.0575
Total requirement	.3271	.3249	.3660	.3423
Average revenue which will result from application of rate schedule ordered by Commission (p. 26 of Order #1530)	.2700	.2700	.2700	.2700
Deficit	.0571	.0549	.0960	.0723

XXXV

The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, purporting to explain or analyze the data contained in plaintiff's exhibits Nos. 5 and 6, the substance of said witness' testimony being as follows:

That the actual operating expenses of the company per M. cubic feet are materially higher than the estimated expenses made by the commission in the order complained of, to-wit: $.1354 per M. cubic feet for the natural gas sold. In Exhibit No. 6, operating expenses have been set up at the figures specified by the commission and to those figures have been added the actual cost of gas per M. cubic feet sold, shown in the company's record. The depreciation allowances and the allowances for return shown on Exhibit No. 6 have been transferred from Exhibit No. 5 and for [fol. 55] the periods shown are based upon the commis-

sion's figures as indicated in the order complained of for the years 1929 to 1931, inclusive, and the first seven months period of 1932. In comparing the total requirements for all expenses with the average revenue which the Commission said would result from their rate schedule as ordered, we find deficits as follows: 1929, $.0571 per M. cubic feet; 1930, $.0549 per M. cubic feet; 1931, $.0960 per M. cubic feet; and for the seven months ending July 31, 1932, $.0723 per M. cubic feet of gas sold. The application of the commission rate to actual gas sales for the same periods shows that those rates are about 7¼ cents per M. cubic feet under that which would be necessary to wipe out the deficit. This study was prepared to show what might result if all the estimates made by the commission were applied with the exception of the cost of gas, a point which is an actual fact. There may be some question about operating expenses at any time and consequently the estimated expenses as indicated in the commission's order were set up. The only thing in the study that is different from those estimates in the commission's order is the cost of gas, that is, the amount actually paid per M. cubic feet during these periods.

In compiling Exhibits Nos. 5 and 6, witness followed in general the same methods that the commission followed in its report in building a rate.

The revenues shown on sheet 2 of Exhibit No. 5, resulting from the application of the commission rate may be compared against witness' total expense figures exclusive of cost of gas for the same year and show just a slight coverage of the expenses because of taxes, with nothing for cost of gas, nothing for depreciation, and nothing for a fair return.

XXXVI

The United States District Court for the District of Montana erred in overruling defendants' objections to plaintiff's witness E. R. Foster's testimony, in substance, to the effect that as a result of the experience since com- [fol. 56] petition commenced and based upon his own personal knowledge, there would not be a wide divergence from the average found by the commission in its customers' analysis in comparison with a customers' analysis at the present time.

XXXVII

The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substances that the spread between expense figures found by the commission of $.1354 per M. cubic feet exclusive of cost of gas, and the witness' figures based on actual operations is about ten cents per M. cubic feet.

XXXVIII

The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substance to the effect that the spread between the commission's findings as to expense per M. cubic feet and the actual result of the company's experience is so great that in the witness' judgment it would not be affected at all by any change in the 27-cent figure and that the revenue requirements during the four periods indicated on page 2 of Exhibit No. 5 checks from 42.05 cents per M. cubic feet sold to 48.24 cents per M. cubic feet sold, and the requirement of each of the periods was much greater than the top step of the rate set by the commission, to-wit: 35 cents per M. cubic feet, and on the basis of average revenue requirement shown on the witness' exhibit No. 5, it would be necessary for the plaintiff to get an average of approximately 45 cents per M. cubic feet as against the commission's allowance of 27 cents average.

XXXIX

The United States District Court for the District of [fols. 57-62] Montana erred in overruling defendants' motion made at the conclusion of the plaintiff's case to strike from the record all of the testimony of plaintiff's witness E. R. Foster relative to the application of the commission's prescribed rate in its report and order No. 1530, and the estimated earnings thereof, and all evidence concerning Exhibits Nos. 5 and 6, and each of said exhibits, for the reasons that the same do not tend to support any issues tendered by the complaint herein, are wholly irrelevant, and on the further ground that the question of the confi-catory character of the rates prescribed by the commission are nowhere put in issue by the complaint herein.

Wherefore defendants pray that the said permanent injunction decree and order be reversed and set aside, and for such other and further relief as to the court may seem just and proper.

Dated at Helena, Montana, this 26th day of November, 1932.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Attorneys for Defendants and Appellants, Residing at Helena, Montana.

[File endorsement omitted.]

[fols. 63 & 64] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Nov. 26, 1932

On motion of Francis A. Silver, Esq., counsel for defendants and appellants, it is hereby ordered that an appeal to the Supreme Court of the United States from the permanent injunction decree and order heretofore filed and entered herein on October 15, 1932, be, and the same is hereby allowed, and that a transcript of the record, testimony, exhibits, stipulations, and all proceedings duly authenticated be forthwith transmitted to said Supreme Court of the United States, in accordance with the rules of such court in such cases made and provided.

It is further ordered that the bond on appeal be fixed at the sum of One Thousand ($1,000.00) Dollars.

Dated at Helena, Montana, this 26th day of November, 1932.

Charles N. Pray, Judge.

[File endorsement omitted.]

[fols. 65-71] Citation, in usual form, showing service on E. G. Toomey et al., filed November 28, 1932, omitted in printing.

[fol. 72] IN UNITED STATES DISTRICT COURT

No. 1060

GREAT NORTHERN UTILITIES COMPANY, Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, DAN BOYLE, LEE DENNIS, and Leonard Young, Members of said Commission, and L. A. Foot, Attorney General of the State of Montana, Defendants

Statement of Evidence—Filed Dec. 15, 1932

CAPTION

Be it remembered that the above-entitled cause came on regularly for final hearing upon the merits before the above court sitting in equity, Hon. William H. Sawtelle, Circuit Judge, Hon. Geo. M. Bourquin, and Hon. Chas. N. Pray, District Judges, presiding, on the 19th day of September, 1932, upon the issues formed by the Bill of Complaint and the Answer thereto, Gunn, Rasch, Hall and Gunn, and E. G. Toomey, appearing as counsel for plaintiff, and L. A. Foot, Attorney General of the State of Montana, and Francis A. Silver, Counsel for Public Service Commission of Montana, appearing as counsel for defendants.

That pursuant to an order of the above-entitled court, made and entered September 1st, 1932, the evidence in the above-entitled cause upon final hearing was taken before E. K. Cheadle, Jr., an Examiner appointed by the above-entitled court to take testimony in the above-entitled cause for final hearing, on September 12, 1932, at Shelby, Montana, which evidence received and taken before said Examiner was the only evidence taken in the above-entitled court and cause upon final hearing as aforesaid, and that the said evidence on final hearing, together with all objec-
[fol. 73] tions thereto, was duly reported to the above-entitled court by said Examiner on the said 19th day of September, 1932, and was as follows:

Plaintiff's Case

Plaintiff offered in evidence a true, full and correct copy of Report and Order No. 1530, issued by Public Service

Commission of Montana on January 22, 1929, in its Dockets Nos. 991 and 1028, in the matter of Public Service Commission of Montana v. Great Northern Utilities Company, respondent, whereupon the defendants interposed the following objection, to-wit:

"Mr. Silver: For the record let it be shown that at this time the defendants, and each of them, object to the introduction of any evidence on behalf of the complainant herein on the grounds and for the reasons that the said complaint does not state facts sufficient to constitute a cause of action in equity, or at all."

Whereupon, and after the said objection of defendants had been duly noted in the record by the Examiner, said above-mentioned report and order No. 1530 was received in evidence, subject to said objection, which said report and order is in words and figures (omitting formal caption) as follows:

[fol. 74] OFFER IN EVIDENCE

By the COMMISSIONER:

On September 21, 1927, the Commission, upon its own motion, instituted an inquiry into the reasonableness of the rates charged by the Great Northern Utilities Company (hereinafter called utility), for natural gas service at Shelby, Toole County, Montana. The schedule of rates then in effect commenced with a base rate of 60 cents (net) and through a series of five steps reached the lowest rate charged, to-wit: 30 cents (net) for all consumption over 300,000 cubic feet per month. Prior to the return day upon the order to show cause why the rates should not be reduced, the utility filed a new tariff with the Commission stating rates as follows:

			Net
First	10,000 cu. ft. per month per meter		50c per M. Cu. ft.
Next	10,000 " " " " " "		45c " " " "
Next	30,000 " " " " " "		40c " " " "
Next	250,000 " " " " " "		35c " " " "
Over	300,000 " " " " " "		30c " " " "

Minimum Bill: $1.50 per month per meter.
Prompt payment discount: None.

The tariff was approved tentatively by the Commission to await its findings in the instant inquiry. The only re-

duction between the net rates of the prior schedule and the one tentatively approved is found in the first 10,000 cubic feet consumption. On November 15, 1927, the utility filed a written return to the order to show cause setting forth a resume of its operating revenues and expenses and alleging, "that the actual investment in the gas utility up to October 1st, 1927, exceeds one hundred thousand ($100,000.00) dollars. That the cost of reproduction new of the property devoted to the gas service is in excess of one hundred twenty-five thousand ($125,000.) dollars and that the fair present value of the gas property devoted to public service at Shelby demands and requires in order to earn a fair return in accordance with the decisions of the Supreme Court of the United States, increased rates for gas service." The cause was regularly assigned for public hearing and came on to be heard at Shelby, on November 29, 1927, at which time the utility submitted evidence concerning its properties and gas operations at Shelby. The figures submitted by the utility were challenged in many important respects by citizens appearing upon behalf of consumers at Shelby. So [fol. 75] great was the disparity in the figures submitted by the utility and those offered upon behalf of the citizens' committee that the Commission deemed it necessary that a valuation be made by its engineering staff, which was accordingly done. For the purpose of receiving the report of its Chief Engineer in evidence in the record, a second public hearing was held at Shelby on October 1, 1928, copies of our engineer's valuation having been furnished to the utility and the citizens' committee in advance.

On January 10, 1927, prior to the institution of this investigation, the City of Shelby granted a franchise to the Shelby Oil and Gas Company, a local company, organized by citizens of Shelby, authorizing the use of the city's streets and alleys for the laying of gas mains, it being the announced intention of the Shelby Oil and Gas Company to construct a natural gas plant in competition with the utility. This franchise ultimately passed, by assignment, to the Citizens Gas Company, a Montana corporation (controlled by Minneapolis, Minnesota, interests), which during the fall of 1928, undertook and completed a pipe line leading to Shelby from natural gas wells situated about three miles from Shelby and a distribution system covering the

business section of Shelby, and a portion of its residential area. The Citizens Gas Company commenced distribution of natural gas at Shelby during the latter part of October and is operating under a tariff, approved by the Commission, stating rates as follows:

						Net
First	10,000	cubic feet	per	month	35c	per M. cu. ft.
Next	10,000	"	"	"	30c	" " "
Next	30,000	"	"	"	27½c	" " "
Next	250,000	"	"	"	25c	" " "
All over	300,000	"	"	"	22½c	" " "

Following the commencement of operations by the Citizens Gas Company, the Great Northern Utilities Company filed with the Commission on November 8, 1928, a new tariff providing rates of 25 cents per thousand cubic feet for all consumption up to 300,000 cubic feet per month, and 20 cents per thousand cubic feet for all quantities above 300,000 cubic feet. On November 19, 1928, and before the Commission had taken any action on its tariff of November 8th, the utility filed another tariff embodying further proposed reductions in its rates, the new schedule calling for 20 [fol. 76] cents per thousand cubic feet up to 300,000 cubic feet and 15 cents for all over. These filings were promptly met with a complaint and protest by the Citizens Gas Company on the grounds that the rates were "unfair, unjust and unreasonable" to the Citizens Gas Company; "will not yield nor return a reasonable profit on its investments and represents unjust and unfair competition." This complaint was assigned a separate docket number (1027) and is now pending upon a motion to dismiss for lack of jurisdiction filed by the Great Northern Utilities Company. On November 30, 1928, the Commission, on its own initial motion, ordered this utility to appear before it at Shelby on December 20, 1928, to submit evidence in support of the reasonableness and justness of the rates and charges proposed in its tariff of November 19, 1928, which is designated hereafter as Schedule 4-A. The tariff of November 8th, 1928, was cancelled by the filing of Schedule 4-A, sheet 2. In accordance with the Commission's order, the utility appeared on the date set and through its manager and superintendent produced evidence hereinafter discussed. The Citizens Gas Company also appeared at the hearing as did some twelve

consumers, who allege in their appearance filing that the tariff now proposed by the utility is not proposed in good faith; that the rates therein stated are not remunerative and that they are proposed only for the purpose of driving the Citizens Gas Company out of business.

The issues involved in these two proceedings commenced by the Commission Dockets 991 and 1028—are so interrelated that we have determined to consolidate them for decision. We proceed first to a determination of the fair value of the utility's property, used and useful, for the convenience of the public.

The utility submits the claim that the total value of its property and business, used and useful, devoted to natural gas service at Shelby, as of August 31, 1928, is 213,208.91. The segregated items composing its claimed rate base are set forth by the utility's engineer in his exhibit 8, Docket No. 991, hearing of October 1, 1928. They are as follows:

[fol. 77] Minimum Value of contract	$75,000.00
Original Purchase:	
(a) Land and Building (Gas Dept.)	3,000.00
(b) Clearing Way for Gas Utility	2,000.00
Improvements on Land and Building (60% to Gas Dept.)	2,621.11
Plan and Construction Engineering	15,000.00
" " " " Superintendence	10,000.00
Legal Expense (No Statutory Fees included)	1,500.00
Investment in Physical Property except as above at end of period based on Commission Finding at Sept. 30, 1923, ($31,403.10) plus Construction Expenditures from the company records	58,759.02
Fair allowance for working capital	13,500.00
Cost of Financing	8,028.78
Fair allowance for going value	23,800.00
Total Property and Business	$213,208.91

Buck, Chief Engineer for the Commission, made a valuation of the physical property of the utility upon the basis of reproduction cost new less depreciation at prices prevailing as of January 1, 1928. He arrives at the figure $43,440.86 as the cost of reproducing the utility's plant new and computes depreciation, based upon inspection, at $7,173.80, thus placing its present value (as of January 1, 1928) for rate-making purposes at $36,267.06. Intangibles are not included and land is valued at market value. The following table summarizes his findings:

Item	Reproduction cost	Per cent condition	Present value
Land	$1,300.00	....	$1,300.00
Buildings:			
(a) Office and warehouse	2,481.71	90	2,233.54
(b) Regulator House	1,186.11	95	1,126.81
Distribution:			
(a) Mains	16,914.36	80	13,531.49
(b) Services	4,761.55	65	3,095.01
Meters and Regulators	14,559.15	90	13,103.24
Shop tools	395.24	50	197.62
Office Equipment	600.61	95	570.58
Miscellaneous:			
(a) Car	285.00	70	199.50
(b) Telephone	957.13	95	909.27
Total	$43,440.86		$36,267.06
Equated per cent condition			83.48%

All of the above costs, excepting land, include an allowance of 14 per cent to cover construction overheads, as follows: Engineering and superintendence, 4 per cent; In- [fol. 78] terest during construction, 4 per cent; Insurance one per cent; Omission and contingencies, 2 per cent; and Organization, 3 per cent.

The market value of the land upon which the utility's office is situated and which is used jointly by the gas and electric departments, is apportioned by Buck on the basis of 55 per cent to the gas department and 45 per cent to the electric. The reproduction cost new of the office building itself is apportioned on the basis of 54.5 per cent to the gas department and 45.5 per cent to the electric, while the warehouse is allocated on a basis of 75 per cent to the gas department and 25 per cent to the electric. The ratio of apportionment of land and office fixtures is based upon the relationship in point of numbers between the gas and electric customers. Office building and warehouse allocation is based upon an estimate of the relative quantities of space used by the respective departments. The private telephone line is assumed to be used equally by both departments and is charged to the departments on that basis.

For the sake of convenience we will consider the items of value claimed by the utility, in the order in which they were set forth in Foster's exhibit, supra:

Minimum Value of Contract

The utility secures its supply of natural gas for distribution at Shelby from the Ohio Oil Company, under terms which call for its delivery to the utility at the city gates.

At the first hearing the utility produced a copy of its contract with the wholesale company bearing date of April 20, 1927, and which, by its terms, covered a period of five years beginning with November 14, 1927. Briefly stated, the contract provides for the purchase of natural gas at the city limits on a base pressure of four ounces above average atmospheric pressure and at a standard temperature of 60 degrees Fahrenheit at the rate of fifteen cents per one thousand cubic feet for the first five million cubic feet of gas taken in any month and at the rate of ten cents per M. cubic feet for all additional gas taken in any month. At the hearing in Docket No. 1028, the manager of the utility testified that he had been advised by the Chicago office of [fol. 79] the utility (the utility is owned by the North Continent Utilities Corporation, which is in turn controlled by the William A. Baehr Organization of Chicago), that commencing with November 1, 1928, the utility was to be furnished its supply of natural gas by the Ohio Oil Company at the flat rate of seven cents per thousand cubic feet. No writing of any kind was introduced nor any oral testimony given tending to show to what extent the contract of April 20th, 1927, was modified. We do not know from the record whether the Ohio Oil Company has merely temporarily waived its rights to the contract rates in order to permit the utility to engage in a rate war or whether the contract has been reformed so as to carry the seven-cent rate for its five-year term. Inasmuch as the cost of gas represents a substantial portion of the utility's operating expenses, an important factor in determining reasonable rates for future application at Shelby, the record is deficient. However, the utility makes no greater claim for its contract value under its alleged new rate, so that so far as the immediate subject at hand is concerned, the deficiency is not material.

The utility claims the sum of $75,000.00 as the minimum value of its contract with the Ohio Oil Company and requests that we pass that amount into the rate base upon which it is entitled to earn a fair return. From the record it appears that the company has never carried the contract on its records as an asset and that all sums of money paid to the Ohio Oil Company for natural gas purchased thereunder have been charged to operating expenses. That the contract with the Ohio Oil Company is a species of

property admits of no doubt but whether, in view of the utility's treatment of cost of gas purchased thereunder as an operating expense, it is also entitled to capitalize it in the rate base, is the question. It is true that if the utility did not have the Ohio Oil contract or a contract with some other person or corporation, it would be under the necessity of developing its own gas supply with an added capital investment upon which it would be entitled to earn a fair return, but, whether such a course would be economically sound in view of the extensive development by private interests of the gas fields lying adjacent to Shelby, rendering enormous quantities of natural gas available to purchasers at reasonable cost, is open to serious question. As we con- [fol. 80] ceive the duties of a public utility, it is incumbent upon it to produce its service as economically as practicable and that it is not free to adopt a less economical method of producing its service and charge to its patrons on the basis of such excessive cost. And, having entered into a contract which reduces the cost of obtaining its product below the cost of producing it with a plant constructed by itself, it has not the right to capitalize the difference or any part of it. If it should be made to appear that by reason of its advantageous contract, a portion of the utility's property, theretofore devoted to the public service, is rendered obsolete or unnecessary, equity requires that it be permitted to amortize the value of such superseded property, less salvage, over a term of years out of earnings (Re: Natural Gas Rates at Great Falls, 21 M. U. R. —, P. U. R. 1928 E 803. Our attention has been invited to a number of cases alleged to be in support of the utility's contention, including an expression of this Commission in re: Flathead Valley Electric Company, 19 M. U. R., —, P. U. R. 1926-C, 822. In that case it appeared that the Mission Range Power Company was engaged in furnishing electrical current, under wholesale rates, to the Flathead Valley Electric Company, a public utility engaged in serving the towns of Ronan and Pablo. The cost of the current purchased from the Mission Range Company was charged to operating expenses. In speaking of the amount of return being earned by the utility—there being no contention made that the contract for current should be valued and capitalized in the rate base—we said:

"Of course, this figure does not take into account the value of the Flathead Valley Company's contract with the Mission Range Power Company. That is a property item and, as such, devoted to the Ronan and Pablo services. It might be capitalized and added into the aggregate which goes to make up the rate base, or the contract may be given effect by charging in its annual cost among the operating expenses. This seems to be the method generally followed by Commissions in dealing with plants of this character and so we shall not attempt any capitalization of the contract * * *"

It will be noted that we said that the contract might be capitalized or given effect by charging its annual cost to operating expenses. In this case, the utility asserts the right to do both, a position manifestly inconsistent with our language in the alternative.

Other cases cited by the utility as sustaining its right to [fol. 81] capitalize the Ohio Oil contract are: Bonbright vs. Geary, 210 Fed. 44, Duluth Street Railway Company vs. Railroad and Warehouse Commission 4-F. (2d) 543, Pacific Gas and Elec. Co. vs. San Francisco, 265 U. S. 463, 44, Supt. Ct. R. 537, 68 Law Ed. 1075, Valparaiso vs. Public Service Commission, 190 Ind. 253, 129 N. W. 13; St. Louis Railway vs. Hagerman, 256 U. S. 314, 41 Supt. Ct. R. 488, 65 Law ed. 946; Re Crystal City Gas Co. (N. Y.) P. U. R. 1925-E, 91; Re Duluth Railway Co. (Minn.) P. U. R. 1927-A 52, and Re Kootenai Power Co. (Ida.) P. U. R. 1923-A 764. A careful reading of these cases discloses, in our opinion, situations unlike the instant one, rendering them unapplicable as precedents herein. In Bonbright vs. Geary, the power contract which the Arizona Commission failed to value was the direct cause of its generating plant, theretofore used in the public service, being abandoned. The old plant, having been abandoned, was not property used or useful in the public service and was therefore eliminated from the rate base. The Federal court's conclusion that the "Corporation Commission should have given this contract a reasonable valuation in view of all of the circumstances of the case", is sustainable under the rule applied by this Commission in Re Natural Gas Rates for Great Falls, supra, to the effect that where patents or contracts for cheaper power or new processes

are introduced in a utility's plant with the effect of quickly rendering absolete and valueless expensive equipment, not exhausted in the service, and of reducing operating expenses, it is not fair or equitable to claim all the benefits of the improved methods for the consumers and leave the utility to carry the burden of its superseded property on its own shoulders. (See Valuation of Public Service Corporations by Whitten (revised by Wilcox), Sec. 719, 1928 Ed.) In the Duluth Street Railway case, it appeared that prior to 1907 the company had generated its own electricity in a plant owned by it. In 1907 the company entered into a contract for the purchase of electric power and the result of the deal was that the old steam plant was dismantled and abandoned. The Commission valued the contract, the special master disallowed the item, and it was restored to the rate base by Judge Booth, who said:

"I am not able to agree with the master in his view. The contract was a thing of value and it differed from an ordi- [fol. 82] nary contract for current supplies. It took the place of a physical plant which would have otherwise been necessary and would have been valued as a part of the physical items. Under these circumstances, I think the commission was justified in including this power contract as an item in the rate base * * *.

"It may perhaps be open to question whether this matter of power contract and the dismantled plant might not have been treated as an unusual obsolescence and allowance made on that basis."

Pacific Gas and Electric Company vs. San Francisco did not concern a power contract but involved the proper valuation of certain patent rights through which manufacturing costs have been greatly reduced. It appeared that the utility paid about $46,000 for certain patent rights, the use of which rendered about $800,000 worth of the utility's property obsolete. The supreme court held that the amount of money actually paid to the inventors was not the proper measure of value. The question of how the patent rights should be valued was left open, the supreme court saying:

"Whether, under the peculiar circumstances here presented, the rates base should be fixed by adding to the agreed inventory some fair valuation of the patent rights,

or whether prompt recoupment should be allowed for the obsolescence caused by their introduction, or whether appellant should be saved from actual ultimate loss by some other feasible method, we will not undertake to determine upon the present record."

In the Valparaiso case, supra, the Supreme Court of Indiana held that a contract for the purchase of electric current held by the utility was a property right and should have been valued for the purpose of rate-making. The opinion further shows, however, that the utility, after entering into the power contract, was forced to abandon a part of its plant. It made the claim that as to this abandoned property it should be allowed to include the value thereof in the rate base or be permitted to amortize its value out of its earnings. The supreme court disallowed its claim, saying:

"It should not be included in the value of this plant for rate-making purposes because it is not actually used or useful in furnishing electricity. No allowance should be made for an amortization fund to take care of this sum."

This case is not inconsistent with the equitable rule above cited—it merely recognizes one method of handling superseded property. In the instant case the company never had [fol. 83] a plant and its contract with the Ohio Oil Company did not result in the supersession or obsolescence of any property.

St. Louis Railway vs. Hagerman, supra, did not involve a valuation for rate-making purposes. It was there held that a contract held by plaintiff to operate its cars over a certain bridge was a property right and taxable as such. We are not disposed to question the decision but find it of no value in this case where value for rate-making purposes is the subject of inquiry.

In re Crystal City Gas Company, supra, the New York Public Service Commission held that the amount paid by a natural gas company, under a contract, for the right to be furnished with natural gas from the fields of a producing company, and without which the utility could not carry on its enterprise, should be included as part of the cost of the plant and property. But, in so holding the Commission said:

"Our decision to include this payment as part of book cost has necessarily been founded upon the peculiar facts before us in this proceeding, and the decision thereon can form no precedent with respect to the inclusion of such payments in book costs generally or in the valuation thereof in proceedings where the facts are not similar to those in the proceedings before us."

The controlling fact in that case was that unless the utility had paid the $25,000.00 for the right to be furnished with natural gas from the field, it could not have undertaken or carried on its enterprise as the seller controlled the gas supply in the field. In the instant case, the utility has not paid out one cent for its contract nor does the Ohio Oil Company control the natural gas supply from the field.

In re Duluth Railway Company, supra, was a proceeding by the Minnesota Commission subsequent to the Federal court's decision (4-F (2d) 543, supra). The commissioned valued the power contract held by the railway but rested its valuation thereof squarely upon the unamortized value of the power plant of the railway company which was dismantled by reason of the company's entering into the power contract.

In re Kootenai Power Co., supra, it appeared that the utility purchased its electrical current for distribution under two contracts—one with the Washington Water Power Company and the other designated as the "Strat-[fol. 84] hern contract." Under the terms of the Strathern contract the utility purchased current at $1,750.00 per annum cheaper than it would have to pay under the Washington Water Power contract. The utility contended that its contract with the Washington Water Power Company was a fair and just one and that for its diligence in negotiating and concluding the Strathern contract it should be permitted to capitalize the savings at seven per cent or at $25,000.00. The Commission found the rates provided in the Washington Water Power contract were reasonable and that the utility was saving $1,750.00 annually by reason of the existence of the Strathern contract, which alleged savings capitalized at 8 per cent amounted to $21,875.00. As a reward for the utility's ability to conclude the Strathern contract it was permited, by a divided vote of the commission, to include one-half of the capitalized savings in its

rate base, the benefit of the other fifty per cent being assigned, according to the decision, for the benefit of the patrons of the utility. It will be noted from a reading of this decision that in the valuation of the Kootenai Power Company's property the commission did not assign any value to the utility's contract with the Washington Water Power Company nor did it value the Strathern contract. It will also be noted that the cost of current purchased under both contracts was charged to operating expenses.

It is obvious that the Kootenai decision when analyzed offers no support for the utility's contention.

Considerable evidence was introduced at the original hearing tending to show that the contract between the utility and Ohio Oil Company was improvident in that the rate charged by the Ohio Oil Company was excessive and unreasonable. It was shown that gas was purchasable in the field at from 3 to 5 cents per M. cubic feet at the well, and that the witness Johnson had offered to furnish natural gas at the city limits for 7 cents per M. cubic feet. In view of the fact that the Ohio Oil Company is now receiving 7 cents per M. cubic feet instead of the contract rates of 15 and 10 cents and because the record is in doubt as to the exact status of the contract of April 20, 1927, we withhold decision upon the providence or improvidence of the contract of April 20, 1927. The new rate of seven cents per M. cubic feet appears to be a reasonable rate and until it is [fol. 85] made the subject of direct inquiry, we will assume that it is not an unreasonable rate for the utility to pay for its gas supply at the city limits.

Land and Buildings

In Benjamin vs. Great Northern Utilities Company, 17 M. U. R. 487, P. U. R. 1924-B 705, we disallowed an item for $10,000 for "Land and property", on the ground that it did not appear that the land or property claimed as an asset was devoted to the gas service of the utility. We there made reference to the fact that "it appears in substance to have been the price which Williams paid James A. Johnson for all his property and rights when Williams secured the Johnson Electric plant on November 18, 1922." The utility now claims that of the ten thousand dollars paid Johnson, the sum of three thousand dollars should be allocated to the gas department as the value of its interest in

the land jointly used by it and the utility's electric department. In rejecting this claim it is sufficient to say that the value of such portion of the land, originally purchased from Johnson, as is properly allocated to the gas department will be valued on the basis of present market value and that the value of such portion of the buildings jointly used by the gas and electric departments as is properly allocated to the gas department, will be valued on the basis of reproduction cost new less depreciation. Both of these items are treated infra under the heading of "Value of Physical Plant."

Clearing Way for Gas Utility

Of the sum of ten thousand dollars paid Johnson, the utility claims that the amount of two thousand dollars was paid for clearing the way for the introduction of a gas utility in Shelby. Johnson testifies in this record that the consideration for the $10,000.00 was as follows: $2,500, for five lots adjoining the town of Shelby, a proposed electric plant site; $1,500, for the town lots and buildings thereon which housed his electric light plant; and, $6,000, for the electric light plant itself. As to the last mentioned figure, he states that it represented fifty per cent of the valuation placed on his plant by this Commission. Johnson is emphatic in his statement that the sale had nothing to do with bringing natural gas into Shelby. Whether or not [fol. 86] the utility, or its agent, purchased the Johnson Electric Plant with the thought in mind of supplying natural gas to Shelby, is immaterial as we view it, as it is evident from the record that the utility received full value for the $10,000 in land, building and equipment.

Improvements on Land and Buildings

Discussion of this item is made under the heading of "Value of Physical Plant", infra.

Plan and Construction

Engineering and Superintendence

For plan and construction engineering the utility claims an allowance in the rate base of $15,000, and for plan and construction superintendence the sum of $10,000. We dis-

allow both items. In our valuation of the plant on the basis of reproduction cost new, we have allowed four per cent as an overhead on all material and labor items, which we consider ample under the circumstances. We note in passing that when the utility's plant was valued in 1923 (Benjamin vs. Great Northern Utilities, supra), no claim was then put forward by the utility for such sums, nor was our order allowing the sum of $25.00 for engineering ever appealed from. That no such sums as is here claimed was ever expended by the utility is clear from the company's records which contain no entry to that or similar effect and that no such sums would be required to be expended in a reproduction of the present plant is also patent from the record.

Legal Expenses

The claim of $1,500.00 for alleged legal expenses incurred in connection with the organization of the utility finds no substantial support in the record as to amount. In accordance with the practice of the Commission to take care of legal and organization expenses through an allowance among the overheads, we reject the item of $1,500.00 for alleged legal expenses.

Value of Physical Plant

Land: As above indicated, the electric and gas departments of the utility are housed together in one office building and jointly use the company's warehouse. The lot upon which these buildings are situated are appraised by [fol. 87] various residents of Shelby, familiar with real estate values, at figures ranging from $750.00 to $2,500.00. Buck estimates its market value at $2,000.00, a figure which we believe to be substantially accurate. The land upon which the regulator station is situated is given a market value of $200.00. Buck's allocation of 55 per cent of the value of the office building lot to the gas department, based upon the ratio existing between the number of gas customers and electric consumers, is one of several methods that might have been employed. We are satisfied that his conclusion reflects a fair apportionment.

Buildings: Buck estimates the reproduction cost new of the office building at $4,012.46; the warehouse, $393.23, and the regulator station at $1,186.11. The utility offers no

reproduction cost figures nor any specific figures as to the value of these buildings. We adopt Buck's estimate of value and his apportionment of 54.5 per cent of the office building and 75 per cent of the warehouse to the gas department.

Distribution System: The utility does not question the inventory of its property as compiled by Buck. Its chief criticism of Buck's valuation of its distribution system—this also applies to services and meters—is that Buck makes no allowance for piecemeal construction and that his unit prices are too low. As to the former, it is clear that under a strict application of the reproduction method, there is no reason for the application of piecemeal methods as it is assumed that the entire property would be reconstructed by the quickest and most economical method. As to the latter, it is quite generally recognized that in the adoption of unit prices there is wide room for variation and error. (Final Report of Valuation Committee of American Society of Civil Engineers—Proceedings, 1917, page 1311.) As remarked by the authority last cited, "The unit prices on most of the items entering into a valuation are not capable of exact and absolute determination or proof. This is especially true of all items in which labor largely enters into the cost."

Buck places the reproduction cost of the distribution system, including overheads at 14 per cent, at $16,914.36. Using Foster's unit prices, same overheads as Buck, we arrive at $21,266.74. The disparity in the figures lies in the different costs allowed by Buck and Foster for labor in [fol. 88] laying of the mains. Buck's labor cost figures are the result of a study of actual cost data secured from similar undertaking at Havre, Chinook, and Glendive, Montana, consideration being given to wages prevailing at Shelby. Foster's estimate of labor costs is based upon a study of statistics compiled from previous valuations of natural gas plants made by him from work orders where the time consumed was shown and from studies made by street foremen in laying mains and setting meters.

Services: Buck estimates the present value of reproducing services, including overheads, at $4,761.55. Foster's estimate, using 14 per cent overheads, total $5,434.31. Again, the difference is laid to the use of different labor costs.

Meters and Regulators: Under this heading Buck has placed the reproduction cost new of meters, regulators, installations at electric plant and regulator station, at $14,559.75. Applying Foster's unit prices and 14 per cent overheads to meters and regulators installed (no question being made as to installation equipment), the total is $15,145.78.

It is perhaps true that Buck in the construction of unit prices has not given sufficient recognition to Shelby's proximity to the oil field and the influence that high wages in the field exerts on the price of labor at Shelby. In view of the fact that there has been no great fluctuation in material prices since the last valuation of the utility's gas plant and the further fact that its construction expenditures on its system indicate a much higher cost than Buck's estimate, we are inclined to view that under the particular circumstances of this record, the application of Foster's unit prices will more accurately reflect the reproduction cost to the above items.

Overheads: The utility contends for an allowance of 20 per cent to cover construction overheads as against fourteen per cent employed by Buck. We see no occasion to depart from our experience standard in this respect, which Buck has followed.

Depreciation: The utility makes no showing as to the amount of depreciation existing in its plant contenting itself with the assertion that it is rendering one hundred per cent service. But, as we have heretofore pointed out [fol. 89] (Re Union Electric Co., 21 M. U. R. —; P. U. R. 1928-E 396), the fact that a utility is rendering efficient service does not establish the fact that depreciation in its plant is non-existent. Buck has, after inspection, made an estimate of the per cent condition of the various units and we adopt his findings in this respect. Due to the fact that we have increased the estimated reproduction cost of certain items, above noted, the specific amount of depreciation as found by Buck must be corrected to $8,338.42.

Working Capital

Working Capital in a rate proceeding is quite generally held to be the amount of the capital which the investors are required to put into a business over and above the investment in plant and intangibles in order to cover the gap be-

tween cash expenditures in the production and delivery of service and the collection of revenue from the sale of service (Re Union Electric, supra; Whitten-Wilcox, "Valuation of Public Service Corporations", Sec. 780). In this case the utility claims the sum of $13,500.00 as a fair allowance in its rate basis for this purpose. Buck estimates the sum of $4,500.00 as being an outside figure—this to include material and supplies as well as cash working capital. The figure submitted by the utility was compiled by the company's auditor by taking operating expenses for a 45-day period, adding thereto the total of accounts receivable, material and supplies on hand, and cash in till and on deposit. Buck's estimate is influenced largely by the practice of certain utilities in setting aside a sum equal to one-ninth of its annual operating expenses, a practice based upon the assumption that it takes about six weeks to get in receipts from service sold. Buck also took into consideration the maximum amount paid in any one month for gas purchased, average monthly pay roll expense, and the quantity of material and supplies reasonably necessary to have on hand. We do not agree with either estimate. No hard and fast rule for determining the amount of working capital has been devised because each utility presents an individual case. In each case the working capital requirement is to be measured by the amount of funds necessarily furnished by the utility to keep operations running smoothly, safely and economically. This utility stands in a much different position than the one [fol. 90] that produces and delivers service and pays for the cost of production and delivery in advance of the receipts of its revenues therefrom. The principal items of the utility's operating expenses are cost of gas purchased and pay roll of officers and employees. Under its contract with the Ohio Oil Company, the utility settles for gas purchased on or before the 20th day of each month for all gas taken during the preceding month. Its meter-reading date for consumers is about the 23rd of each month and all customers' bill are due and payable on the first of the month next preceding the meter-reading date. The practical effect of the arrangement is that the utility receives considerable money from its customers upon a resale of the gas purchased by it from the Ohio company before it settles with the wholesaler. The utility does not provide

any discount for prompt payment but under our standard rules and regulations it has the right to insist upon reasonably prompt payment or to discontinue service upon twenty-four hours' notice, and in cases of doubtful non-property owning customers, to require a deposit in advance to cover an estimated 45-day bill. The utility asserts that during the past five years, delinquency in consumers' account has varied from $2,000 to $3,500, but if that is true, it bespeaks an indulgence on the part of the utility that is not chargeable to the customers in general. Our regulations, above adverted to, were designed to insure promptitude in payment and any burden caused by a waiver in their application is to be borne by the utility and not its patrons. In 1927, the utility disbursed in wages to its officers and employees the sum of $4,988.66, or an average of $415.72 monthly. Wages of officers and employees are properly payable promptly on the first day of the month next succeeding the month during which the services were performed and it is therefore necessary that the utility have on hand finances to meet the pay roll. It is likewise proper and essential that the utility have in the till or on deposit a cash balance sufficient to maintain credit and meet irregular demands that may arise, the amount of which is largely a matter of judgment under the facts and circumstances of each case. Consideration must also be given to the amounts of money the utility has on hand in its depreciation reserve, surplus and accrued taxes accounts. To the extent that the balance in the reserve at any time is [fol. 91] not invested in additions necessary to maintain the property as a whole in stable condition per cent of cost new, to the extent that the surplus represents money accumulated for dividends and not yet payable as such in the normal course and to the extent that it has been set aside in its accrued taxes account funds with which to meet its tax obligations not payable until the latter part of the calendar year, these funds tend to off-set working capital requirements. Taxes in Montana are payable for the calendar year, one-half on or before November 30th, of such year and the other half on or before May 30th, of the succeeding year. The utility, under our uniform classification of accounts system is required to set up on its books as an operating expense for January one-twelfth of the total taxes for that year, but not being under the neces-

sity of paying only one-half thereof on November 30th of that year, it has in its possession sums collected as revenue, ranging from a minimum of five months' tax accruals to eleven months. Assuming that the utility's taxes for 1927, namely, $1,437.23, is approximately its normal annual tax, it has a tax accrual of approximately $122.00 per month, or it has on hand at all times in this tax account a fund ranging from $610.00 to $1,342.00, which tends to reduce its working capital requirements, as deferred payments to plaintiff may be compensated in deferred payments by it.

Under its new arrangement with the Ohio Oil Company, its annual cost of gas purchased is reduced approximately fifty per cent. Upon the assumption that the amount of gas purchased for the twelve months ending August 31, 1928, is typical, its cost would be $9,800.00, or an average of $816.67 per month, as against an average monthly cost of $1,785.42 for 1927. But it is apparent from the record that unless conditions change, the utility will not purchase nor sell as much gas in the future by reason of the competition offered by the Citizens Gas Company, which has already acquired some 135 former customers of the utility. Under the circumstances of the record we find that $1,250.00 is a fair allowance for cash working capital.

As to the amount of supplies and materials that should be allowed for in working capital, this also is a matter of judgment based upon the actual requirements of the utility. A mere inventory of material and supplies on hand at any [fol. 92] given period is not conclusive and often not even persuasive of the proper amount to be allowed. Material and supplies carried in stock by the utility for the purpose of making repairs, installations, etc. are as much a part of its property devoted to the public service as is its main plant. It is of utmost importance that there be no cessation in public service and that a prospective consumer wishing to attach himself to a utility's service should not be postponed in securing a connection. Having in mind the size of the plant herein involved, the fact that the utility undertakes no obligation with reference to the pipe line leading from the gas wells to the city limits, the number and location of its customers, and all other factors that affect the situation, we are of the opinion that $1,250.00 is a fair allowance for material and supplies.

Cost of Financing

With respect to cost of financing, we disallow the utility's claim in accordance with the views expressed in re: Natural Gas Rates for Great Falls, supra.

Going Concern

The valuation of the utility's property herein is made on the basis of it being a going concern. For the reasons state in re: Union Electric Co., supra, we decline to make any specific allowance for going concern value.

Present Fair Value

From the above findings we conclude that the present value of the utility's property, used and useful, at Shelby, Montana, devoted to natural gas service for the convenience of the public as of January 1, 1928, was $43,214.22. Construction expenditures between January 1, 1928, and August 31, 1928, amounted to $2,877.50. At the December 20th hearing, the manager of the utility advised the Commission that the value of its property was the same as stated by the witness Foster at the October 1st hearing. Thus, by adding the actual construction expenditures for 1928, without deducting any depreciation, we arrive at the sum of $46,091.72, as the present value of the utility's property as of the last date of inquiry. The following table summarizes our findings to reproduction cost new, depreciation and present value:

[fol. 93]

Item	Reproduction cost	Depreciation	Present value
Land	*$1,300.00	.....	*$1,300.00
Buildings:			
(a) Office and warehouse	2,481.71	$248.17	2,233.54
(b) Regulator houses	1,186.11	59.30	1,126.81
Distribution:			
(a) Mains	21,266.75	4,253.35	17,013.40
(b) Services	5,434.31	1,902.01	3,532.30
Meters and Regulators	15,145.78	1,514.58	13,631.20
Shop Tools	395.24	197.62	197.62
Office Equipment	600.61	30.03	570.58
Miscellaneous:			
(a) Car	285.00	85.50	199.50
(b) Telephone	957.13	47.86	909.27
Additions in 1928	2,877.50	.....	2,877.50
Totals	$51,930.14	$8,338.42	$43,591.72
Working Capital			2,500.00
Total present value of gas utility			$46,091.72

* Market value.

Revenues and Expenses

The annual report of the utility for the calendar year 1927 shows the following revenues and expenses:

Total Operating Revenues:		$59,563.04
Operating Expenses:		
Production	$21,425.12	
Distribution	2,321.35	
Commercial	3,298.73	
General	9,451.16	
Undistributed	1,067.37	
Depreciation	3,000.00	
Taxes	1,473.36	
Total Operating Expenses		42,037.09
Net Operating Revenue		$17,525.95

Our analysis of the utility's books for the twelve-month period ending August 31, 1928, shows revenues and expenses as follows:

Total Operating Revenues	$52,965.65
Total Operating Expenses	39,061.68
Net Operating Revenues	$13,903.97

Foster in his exhibits sets up revenues and expenses for the same two periods, as follows:

[fol. 94]

	1927	12 months ending Aug. 31, 1928
Total Operating Revenues	$59,563.04	*$51,958.74
Total Operating Expenses (including taxes but excluding depreciation)	39,037.09	†35,512.04
Net Operating Revenue	$20,525.95	$16,446.70
Deduct Fed. Income Tax	878.12	1,466.71 (est.)
Total available for depreciation and return	$19,647.83	$14,979.99
Fair allowance for depreciation	4,470.52	4,700.72
Total available for return	$15,177.31	$10,279.27

* Adjusted to reflect rates that went into effect October, 1927.
† Adjusted to reflect cost of gas under April 20, 1927, contract.

Whether we accept the figures from the annual report, Buck's compilation or Foster's set-up, it is apparent with-

out any further analysis that upon the rate base we have found herein as representing the fair value of the utility's gas property, the rate of return to the utility has been unreasonable and excessive, justifying the conclusion and finding, which we hereby make, that the rates that were in effect when this inquiry was commenced and the rates that were approved tentatively pending completion of this investigation were and are unjust and unreasonable rates.

In conection with the revenues of the utility we note monthly charges against the electric department for gas furnished to it by the gas department. Taking December 1927, for example, the records of the utility show that during that month the electrical department used 3,804,700 cubic feet of natural gas for which the gas department received a credit of $570.70, which figures out at the rate of 15 cents per thousand cubic feet, which was the contract price at that time for any amount less than five million cubic feet. The practical effect of selling gas to the electrical department at contract price is to prefer electrical consumers to the prejudice of gas consumers. It requires extra mains and equipment to serve the electrical department. These are carried as part of the gas investment. The gas consumers not only carry the added investment upon which they are required to pay a fair return, but [fol. 95] must likewise carry the burden of depreciation and taxes on the increased investment, maintenance expense on the additional equipment and leakage in the mains, specially required to serve the electrical plant. The utility doubtless has the right to furnish its electrical department with gas at cost but that cost must truly reflect all items that properly enter into a determination of cost. That this item is of no small consideration is apparent from the fact that during 1927 practically 21 per cent of the total gas purchased during the year was transferred to the electrical department and settled for on the basis above suggested.

Comparing operating expenses of the utility for 1927 with previous years, we find that the operating expenses, exclusive of cost of gas purchased and depreciation, have, in the aggregate, taken a decided upward trend. To illustrate: In 1924, the total operating expenses of the utility (less cost of gas purchased and depreciation), amounted to $10,019.03; in 1925, $11,670.11; in 1926, $12,558.94; whereas,

in 1927, it totaled $17,511.97, and for the twelve-month period ending August 31, 1928, amounted to $18,528.16. Part of the abnormal increase reflected in the last two figures is to be found in the alleged expense incurred by the utility in connection with our hearing of November 29, 1927. According to the utility's books, it expended $4,386.25 in connection with this hearing. The largest single item is for alleged "special services Chicago office", in the amount of $2,849.27. Neither the records of the company in Montana, nor the testimony of the witnesses for the utility, offer any itemization or reasonable explanation of the charge, nor can we from an examination of the transcript of that hearing find any such special services. In view of the fact that after paying all of the alleged expenses incurred in connection with the first hearing, the utility was able to and did earn an excessive rate of return, we do not feel called upon to say any more than that if the merits of payments to the Chicago office for alleged special services becomes material in any future proceeding on the question of whether or not the utility is earning a fair return, before the Commission will accept such payments as legitimate operating expenses, it will require proof of actual service and evidence of the reasonable value thereof. Ordinarily, [fol. 96] the costs legitimately incurred in connection with a rate proceeding should not be paid out of current revenues but should be amortized over a reasonable term of years.

Docket No. 1028

In justification of its schedule 4-A sheet 2, the utility develops of record the fact that it has been engaged in the distribution of natural gas at Shelby since the forepart of 1923; that prior to the month of October, 1928, it was the only utility furnishing such service at Shelby; that during October, 1928, the Citizens Gas Company completed the construction of a distributing system at Shelby and commenced selling natural gas in competition with the Great Northern Utilities Company, at a schedule of rates lower than the Great Northern's, the base rate of the new company being 15 cents per thousand cubic feet lower than that of the Great Northern's; that with the advent of the Citizens Gas Co. into the utility's field, the Great Northern

lost to the Citizens Gas Company, 137 customers, two of which had been recovered at date of hearing, and that in order to protect its investment in its gas property at Shelby it has decided upon a schedule of rates commencing with a base rate of 15 cents lower than the base rate of its competitor. No evidence was introduced tending to show the utility's probable operating revenues and expenses under the new schedule. So far as the manager of the utility was informed by the Chicago office where the proposed schedule was drawn, no rate study was prepared in connection with the new tariff. In his opinion the rate proposed is not a reasonable one from the utility's standpoint but is justified under the competitive conditions existing at Shelby. To quote his language from the record:

"Rate regulation is just and equitable under ordinary conditions but a competitive situation has arisen at Shelby which forces the Great Northern Utilities Company to protect its investment in the most thorough manner possible and we are willing, if required, to forego for the present the net earnings to enjoy the greatest ultimate benefit."

He further stated that in the event the Citizens Gas Company should meet the new rates as proposed in Schedule 4-A, the utility would propose further reductions. In other words, the utility has thrown down the gauntlet of [fol. 97] battle to its competitor and insists upon a fight to a finish.

At the outset, the utility takes the position that the Public Service Commission Act (Chapter 52, Laws of 1913: Sections 3879 to 3913, inclusive, R. C. M. 1921), does not contain any grant of power to this Commission authorizing it to make and enforce minimum as distinguished from maximum rates or to prescribe specific rates and that a public utility is free to charge any rate it may see fit provided that such rate does not exceed a maximum reasonable rate. If the utility is correct in its contention, the Commission has no choice in the premises but to approve schedule 4-A as the rates stated therein are admittedly below the level of a maximum reasonable rate.

It therefore becomes necessary to examine the provisions of the Public Service Commission Act to determine whether or not the legislature has in its provision for a comprehensive and uniform system of regulation and control of public

utilities by the state through this specially created tribunal limited the Commission in rate matters to the establishment of reasonable maximum rates. It is settled law that agencies such as a Public Service Commission have "such powers and such only as are conferred upon it by statute either expressly or by necessary implication." (C. M. St. P. Ry. Co. vs. Board of Railroad Commissioners, 76 Mont. 305; 247 Pac. 162), and that "the Commission is a mere administrative agency created to carry into effect the legislative will. It has only limited powers, to be ascertained by reference to the statute creating it, and any reasonable doubt as to the grant of a particular power, will be resolved against the existence of the power," (State vs. Boyle, et al., 62 Mont. 97; 203 Pac. 378).

Section 5 of the Act (3883) provides that "the charge made by any public utility for any heat, light, power * * * produced, transmitted, delivered or furnished, or for any service to be rendered as or in connection with any public utility, shall be reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful." Section 11 of the Act (3891) provides that every public utility shall file with the Commission schedules, open to public inspection, showing all rates, tolls, charges, which it has established, and that "no change shall thereafter be [fol. 98] made in any schedule * * * except upon twenty days' notice to the Commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided, that the commission, upon application of any public utility, may prescribe a less time within which a reduction may be made; *provided, however, that no advance or reduction of existing schedules shall be made without the concurrence of the commission.*" Section 12 (3892) provides that "it shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect, or receive any rate, toll or charge not specified in such schedules. The rates, tolls and charges named therein shall be the lawful rates, tolls and charges until the same are changed, as provided in this act." Sec-

tion 17 (3898) provides, among other things, for the filing of complaints, by parties directly interested, against unreasonable or unjust rates and for hearings thereon. Section 19 (3899) authorizes the Commission, "If, upon such hearing * * * the rates, tolls, charges, schedules * * * shall be found to be unjust, unreasonable or unjustly discriminatory * * * *the commission shall have the power to fix and ordered substituted therefor, such rate or rates, tolls, charges or schedules, as shall be just and reasonable.*" The same section authorizes the commission to proceed upon its own motion to investigate rates, etc., and after a full hearing "by order make such changes as may be just and reasonable, the same as if a formal complaint had been made." Section 25 (3905) declares that "All rates, fares, charges * * * fixed by the commission shall be enforced, and shall be prima facie lawful, from the date of the order until changed or modified by the commission", or by order of court upon a proper review of the commission's actions.

Construing the Act so as to give effect to all its parts, the conclusion appears inevitable that it was the intention of the legislature to clothe the Commission with the power to regulate rates and to fix a specific rate, instead of a mere [fol. 99] maximum. The provision that we shall have the right to fix and substitute just and reasonable rates, after investigation and hearing, for rates being charged by a utility and the express declaration that no advance or reduction of existing schedules shall be made without the concurrence of the commission bespeak a legislative intent wholly at variance with the utility's contention herein. It is only reasonable to assume that if the legislature intended that the Commission should only have the power to fix maximum rates that it would not have placed any restrictions upon reductions in rates below the level of existing schedules except the requirement that such reductions be filed with the Commission. The fact that a reduction in existing schedules cannot be made without the concurrence of the Commission clearly indicates that such a reduction cannot be made as a matter of right. As was pointed out by the Supreme Court of Montana in Northern Pacific Ry. Co. vs. Bennett, decided December 27, 1928, "the requirement that a person must secure leave from some one to entitle him to exercise a right, carries with it, by irresistible

implication, a discretion on the part of the other to grant it, if in his judgment, it is improper or unwise to give the required consent." In determining whether or not the Commission shall concur in a proposed advance or reduction in existing schedules, our judgment is to be measured by the provision that rates charged by a utility shall be just and reasonable—fair to the consumer and fair to the utility.

It is conceded that the rates embodied in Schedule 4-A will not yield a fair return to the utility. Further, the record supports the finding that the prof-erred rates will not even yield enough revenues to defray normal operating expenses, including a fair allowance for depreciation, under existing conditions at Shelby, nor would they provide sufficient income to cover normal operating costs if conditions were the same now as they were during the calendar year 1927 when the utility sold more natural gas than it had during any year since its entry into the utility field. Assuming that the utility has the right to waive its right to a fair return, or any part of it, it is apparent to us that it cannot waive its rights to such an extent as to imperil or [fol. 100] impair its ability to render dependable, adequate service to the public it serves. It is a primary duty of a public utility to properly maintain its plant and equipment to the end that it can render adequate service to the residents of the territory it professes to serve. Quality of service and freedom from interruptions in service are just as important to consumers as are reasonable rates. In this modern day communities have become so dependent upon services furnished by public utilities for the successful prosecution of industries and for use in the home that any impairment in efficiency or continuity of service would not only result in serious inconvenience but in many cases downright hardship. The utility must look to its rates to provide its operating expenses. If they are insufficient, curtailment or entrenchment generally ensues; competent personnel is often replaced by mediocre and less expensive employees; ordinary repairs are neglected; inferior materials are used in making absolutely necessary repairs and retirement of units, worn in the service, postponed, all tending to affect the quality of the service and to render probable serious interruptions in the service. So it is perfectly plain to us that any rate schedule that would tend to

produce such results is detrimental to the public interests and therefore unjust and unreasonable. By reason of the findings and views hereinabove expressed we conclude that the rates set forth in schedule 4-A sheet 2 are unjust and unreasonable and we therefore decline to concur in or approve the same.

It has been the practice of this Commission in the past in cases involving the establishment of rates for utilities engaged in rendering the same character of service in the same locality to determine a just and reasonable rate for application in the particular locality and require both utilities to serve at that rate (Public Service Commission vs. Blue Flame Gas Company, 19 M. U. R. —; P. U. R. 1926-D 777). This same view has been expressed by other public utility commissions (Re: Los Angeles Gas and Electric Corp., P. U. R. 1927-C 545; Re: Southern California Gas Company, P. U. R. 1919-D, 155, P. U. R. 1918-A, 604; Re: Street Railway Rates (D. C.) P. U. R. 1921-E 13; Pacific Gas and Electric Co. vs. Great Western Power Co., 1 Cal. R. C. R. 203).

[fol. 101] The following quotation from the Blue Flame Gas case, supra, is apropos of the present situation:

"However, it has been conclusively demonstrated in almost every small community where the experiment has been tried, that the grant of franchises to competing public utilities is wrong in principle and invariably results in unsatisfactory service. Competition has long ceased to be potent as a regulatory factor in public utility operations. Where it was relied upon, it proved to be had in the long run for consumers of utility service, as it too often meant duplication of facilities in a field not large enough to support more than one company. The usual outcome of this was consolidation, followed by recoupment by means of high rates of losses due to competition. It has taken a long time for the public to understand that competition as a regulator of charges in the public utility industry is a failure, and even now, the fact is not appreciated by casual observers. (1 Spurr on "Guiding Principles of Public Service Regulation").

"We would feel recreant to our duty if we did not in unmistakable terms denounce the admission of competing public utilities into small communities such as Kevin. The

sooner this idea is abandoned and reliance placed upon the power of the State to secure adequate service, and by appropriate rate regulation cure the natural tendency of monopolies, the better will be the service rendered by many public utility owners in small Montana towns, whose plans for improving and extending their service are constantly harassed by suggestions of the admission of competitors. Under existing law the Commission must recognize the right of both corporations to serve the community of Kevin, and in so doing, it must make rates influenced by competition. Were we to promulgate schedules having exact relation to the value of the property devoted by each corporation to the service, one schedule would undoubtedly be lower than the other, with the result that the utility serving at less cost would enjoy a legal advantage over its competitor. Even our wide-open system of franchises does not seem to countenance such a result. At the very least those who undertake such services are entitled to the good faith of city councils and non-confiscatory treatment by this body. In keeping with our recorded practice, we shall approve the same rates for both utilities and leave the question of survival to the ability of one management or the other to render a superior and more attractive service than that rendered by its competitor."

Our attention is called to a recent decision of the Supreme Court of Utah (Logan City vs. Public Utilities Commission of Utah, 271 Pac. 961), in which the court was called upon to review the action of the Utah Commission in placing the municipally owned electric plant of Logan City upon the same rate basis as the Utah Power and Light Company, which also served consumers residing in Logan City. The action of the commission in so far as it fixed rates for the City of Logan's municipal plant was annulled, the high court holding that under the Utah constitution the Public Utilities Commission had no authority to fix rates for municipal plants even though it be assumed that a [fol. 102] municipal plant fell within the definition of a public utility as found in the Public Utilities Act. Wholly by way of obiter dictum, as we view the decision, a majority of the court took the commission to task for placing the two utilities—one privately owned, one publicly owned—on the same rate basis. While there is language in the de-

cision tending to support the views herein urged by the utility, we are not impressed with the applicability of that case as a precedent to be followed herein for several reasons. In the first place, and this is the controlling consideration, the Public Utilities Act of Utah (Chap. 47, laws of 1917), does not contain a provision with respect to the right of a utility to change existing schedules such as is found in our law (cited supra). Under Section 3 of the Utah Act, it appears that a public utility can change its schedules upon 30 days' notice to the Commission and public in the manner and form prescribed. There is no provision that the Commission must concur in changes. Secondly, the fact that the dispute was between a municipally owned plant and a privately owned utility renders it distinguishable from the instant proceeding. As to the suggestion in the decision that the Commission should have fixed a maximum rate beyond which neither competitor could go in establishing rates with the privilege in each to render service at a lower rate, we believe it to be wholly at odds with the modern trend of thought in public utility regulation (Idaho Power and Light Co. vs. Blomquist, 141 Pac. 1083, 1089, 1090; Guilding Principles of Public Service Regulation by Spurr, Vol. 1 p. 1). It is particularly so, in our judgment, because the Utah Act has the provision requiring a utility to secure a certificate of public convenience and necessity before entering into the public utility field in a given territory. Idaho has a Public Utilities Act substantially similar to Utah, yet its Supreme Court, in Idaho Power and Light Co. vs. Blomquist, supra, draws conclusions to the effect and intent of its act directly at variance with the Utah decision. We quote, with approval, from the Idaho decision:

"* * * there never can be any permanent competition in matters of this kind.

* * * * * * *

[fol. 103] "Under these various utility acts, the commission is generally given power to regulate rates and fix a specific rate, instead of a mere maximum, and that took away the opportunity for rate cutting, one of the principal instruments of warfare between such corporations. Under the act in question, the commission is given power to fix the

rate absolutely, and neither of the competing companies can charge more or less than the rate fixed.

* * * * * * *

"The rate to be determined in each case is a reasonable rate—a rate fair to both the consumer and supplier.

* * * * * * *

"If rates are absolutely fixed by the commission, with no permission to the utilities corporations to charge more or less, the public can receive no advantage from competition. Experience shows that while the people, or some of the people, may receive a temporary advantage from cut-throat competition, the general public can receive no substantial advantage therefrom."

See also: Economic Gas Co. vs. City of Los Angeles, et al., 168 Cal. 448; 143 Pac. 717; Ann. Cs. 1916-A 931.

The matter of prescribing just and reasonable rates under conditions of competition such as we find here is not free from considerable difficulty. A "just and reasonable rate" within the meaning of the statute, supra, is in the nature of things incapable of precise definition as is any expression containing the words "just and reasonable". We are constrained to agree with the Supreme Court of Kansas when it says (State vs. Southwestern Bell Telephone Co., 115 Kansas 236; 223 Pac. 771):

"If a reasonable rate could be exactly and accurately defined, much of the difficulty attending rate regulation would be solved."

Perhaps one of the best definitions of a just and reasonable rate to be found in the cases is the definition given by Justice Swayze in Public Service Gas Co. vs. Board of Public Utility Commissioners, et al., 84 N. J. L. 463, 87 Atl. 651, affirmed 87 N. J. L. 581, 95 Atl. 1079*, where the learned jurist said:

"The next question is whether the rate fixed was just and reasonable. On the one hand a just and reasonable rate can never exceed, perhaps can rarely equal, the value of the service to the consumer. On the other hand it can never be made by compulsion of public authority so low as to

amount to confiscation. A just and reasonable rate must certainly fall somewhere between these two extremes, so as to allow both sides to profit by the conduct of the business, and the improvement of methods and increase of efficiency. Justice to the consumer, ordinarily, would require [fol. 104] a rate somewhat less than the full value of the service to him; and justice to the company would, ordinarily, require a rate above the point at which it would become confiscatory."

Substantially, this is the same definition given in State vs. Southwestern Bell Tel. Co., supra, where the court said:

"Neither rates that do not yield a fair return nor rates that are prohibitive can be said to be reasonable. * * *

* * * * * * *

"A rate that will not permit an adequate return on the value of the property used to produce the service for which the rate is charged, where the user is not required to pay the full value of the service rendered, may safely be said to be unreasonable. A rate that is so high that those who are free to accept the service or refuse it will refuse to take it rather than pay the rate charged, may be safely said to be unreasonable. Somewhere between these two extremes lies a reasonable rate. For the purposes of this case, a reasonable rate may be defined as one which provides an adequate return on the value of the property used in producing the service, and which, where patrons may accept or refuse the service, as they choose is low enough to induce all who desire the service to pay the rate. In this attempt at definition it has been assumed that the telephone exchanges in controversy have been built where they are needed; that they have been properly constructed; that they were economically built; and that they have been well managed."

The above quoted definitions and the authorities generally recognize the rule that a public service company furnishing natural gas (or other product or service) to the public is entitled to a fair rate upon the present fair value of its property used and useful in the public service, to be ascertained at the time the service is rendered. They also recognize the limitation upon this rule, namely, that

a utility will never be permitted to charge more than the worth or value of the service which it is rendering. (Elkins vs. Public Service Commission (W. Va.) 135 S. E. 397; Alexandria & W. Ry. Co. vs. Railroad Commission (La.) 79 So. 863; Smythe vs. Ames, 169 U. S. 466; San Diego Land and Town Co. vs. National City, 174 U. S. 139; Covington and Lexington Turnpike Road Co. vs. Sanford, 164 U. S. 578; Darnell vs. Edwards, U. S. 564; Simpson vs. Shephard, 230 U. S. 352; Guilding Principles of Public Service Regulation, by Spurr, Vol. 3, p. 528; Groninger on Public Utility Rate Making, 145; Valuation of Public Service Corporations by Whitten (as revised by Wilcox) Sec. 872.) Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exorbitant rate. The duplication of plants at Shelby has increased the capital investment in property devoted to the [fol. 105] public service but it has not increased one whit the value or worth of service to the consumer. To the extent that the existence of the two systems has resulted in the employment of property in the public service in excess of that reasonably required in the public service, it presents a case similar to one of overinvestment by a public utility, where it is rightfully recognized that the burden of overinvestment must not be shifted onto the shoulders of the consumers. Unrestricted competition tends to temporarily depress rates below the plane of reasonableness. Under free competition utilities feel compelled to accept business which pays for the direct cost and very little more. On account of the difficulty of estimating even the direct cost they sometimes accept business at prices returning less than the direct cost. Under a system of regulated competition the self-destructive nature of free competition is eliminated. Competition becomes a matter of furnishing better or more attractive service by the respective competitors rather than the sale of products or service at lower prices. The reasonableness of the rate charged for service is or should be based primarily upon its inherent reasonableness to the consumer. It is inevitable that two companies serving a territory that legitimately offers but enough business for one of the companies to operate on at a fair profit will have to respectively accept a return that will be less than a fair return under ordinary conditions. The rate or rates permitted to be charged must, in our judgment, re-

fleet the fair cost of serving the consumer plus a fair allowance for return.

Referring, then, to the situation at Shelby, we find from the record that the community affords an annual natural gas consumption of approximately 120,000,000 cubic feet; that natural gas is purchasable at the city gates at 7 cents per M. cubic feet; that by reason of line losses, estimated at 10 per cent, the utility is only able to deliver 900 cubic feet of each 1,000 cubic feet purchased, thereby making the cost per thousand cubic feet of gas sold 7.777 cents.

We know from the annual reports of the utility as well as from some of the exhibits in this record that the experience of the utility shows that, exclusive of the cost of gas [fol. 106] purchased, it costs (without any consideration of cost of maintaining a proper depreciation reserve) from 12.25 cents to 15.49 cents per thousand cubic feet of gas sold to do business. The following summary illustrates the utility's experience in this regard.

Year	M. cu. ft. of gas sold	Operating costs other than cost of purchase	Cost per M. cu. ft. sold
1924	72 233.3	$10,019.03	13.87 cents
1925	93 246.3	11,670.11	12.51 "
1926	102 540.2	12,558.94	12.247 "
1927	129 434.4	17,611.97	13.6 "
1928*	119 611.1	18,528.16	15.49 "
Average cost			13.543 "

* 12-month period ending August 31, 1928.

It would thus appear that the cost of gas purchased and cost of doing business (taking the average cost above as approximately correct), when translated into cost per thousand cubic feet of gas sold amounts to 21.32 cents. To this must be added the cost of maintaining a proper depreciation reserve fund, a cost universally recognized as a proper charge to operating expenses. In the former hearing 8 per cent was fixed as the depreciation annuity for this utility. On that basis and our findings above a fair allowance for depreciation is $3,383.34. Distributing that cost over 120,000 M. cubic feet it amounts to 2.82 cents per M. cubic feet of gas sold. Rate of return at 8 per cent on the present value of the utility's property amounts to $3,687.33, or about 3 cents per M. cubic feet of gas sold. Aggregating the above costs per thousand cubic feet of gas sold, it appears that a schedule of rates that will yield an average revenue of 27.13 cents per M. cubic feet sold would, under ordinary circumstances, represent a schedule of rate that is

capable of earning enough revenues to pay all operating expenses, including depreciation, and a fair return upon the value of property necessarily required to render adequate natural gas service to the consumers of Shelby.

A consumers' analysis compiled by Buck reveals the following facts regarding consumption and revenue:

[fol. 107]

Block M. cu. ft.	Total M. cu. ft., sold	Revenue	Per cent of total Gas sold	Per cent of total Revenue
0 to 3	1 541.4	$1,564.98	1.23	2.843
3 to 10	10 739.10	5,550.52	8.54	10.086
10 to 20	23 895.60	11,513.25	19.02	20.921
20 to 50	37 345.1	16,784.52	29.72	30.499
50 to 300	37 254.4	14,543.23	29.65	26.427
Over 300	14 888	5,075.15	11.84	9.222

It thus appears that while approximately 58.5 per cent of the consumption has been in the blocks below 50,000 cubic feet monthly consumption, approximately 64.35 per cent of the revenue has accrued from this source. A rate schedule, responsive to the above analysis, that will yield approximately 27 cents per thousand cubic feet of gas sold, should—employing the type of block schedule now in effect—be as follows (all rates net and subject to a minimum bill of $1.50, the present minimum):

First	10,000	cubic	feet	per	month	.....	35c	per	M.	Cu.	Ft.
Next	10,000	"	"	"	"	.....	30c	"	"	"	"
Next	30,000	"	"	"	"	.....	27.5c	"	"	"	"
Next	250,000	"	"	"	"	.....	25c	"	"	"	"
All over	300,000	"	"	"	"	.....	22.5c	"	"	"	"

This schedule of rates is in our judgment a schedule of just and reasonable rates. What rate of return such a schedule will yield under the competitive conditions now existing at Shelby will depend largely upon the ability of the management to attach new customers, increase consumption among present consumers and to effect such economies in operation as are consistent with adequate service.

An appropriate order will be entered.

Order

At a session of the Public Service Commission of Montana, held in its office in the Capitol, Helena, Montana, Tuesday, January 22, 1929, present Chairman Boyle and Commissioners Young and Dennis, there regularly came before the Commission for final action the matters and

things involved in Dockets Nos. 991 and 1028, and it appearing that the Commission has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all matters and things involved have been duly investigated and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Commission [fol. 108] being fully advised in the premises,

It is ordered that Schedule 4-A, sheet 2, filed by the Great Northern Utilities Company with the Commission on November 19, 1928, stating rates for natural gas service available for all classes of service at Shelby, Toole County, Montana, be not concurred in and that said schedule 4-A, sheet 2, shall be, and it is hereby disapproved and rejected.

It is further ordered that the Great Northern Utilities Company shall on or before the first day of February, 1929, file with the Commission a schedule of rates for natural gas service at Shelby, Montana, effective as of February 1, 1929, and until further order of the Commission, which schedule of rates shall be embodied in a tariff known as Tariff No. 4, as follows, to-wit:

First	10,000 cubic feet per month	35c	per M. cu. ft.
Next	10,000 " " " "	30c	" " " "
Next	30,000 " " " "	27½c	" " " "
Next	250,000 " " " "	25c	" " " "
All over	300,000 " " " "	22½c	" " " "

Minimum Bill: $1.50.

It is further ordered that the Secretary shall serve a true copy of this report and order upon each of the parties hereto, and that the same shall be in full force and effect forthwith according to its terms.

Daniel Boyle, Chairman; Lee Dennis, Commissioner, Being and Constituting a Majority of the Public Service Commission of Montana.

Attest, official:

Francis A. Silver, Secretary. (Seal.)

Commissioner YOUNG:

I dissent. I cannot agree with the majority in ordering in the above rates. I am not concerned about the so-called "rate war" in Shelby but am interested in obtaining the very best rates for the consumers, and when a utility voluntarily reduces its rates, as in this instance, I am in favor

of giving the customers the benefit of the reduction instead [fol. 109] of denying them the relief offered. In my humble opinion, the Public Service Commission Law was not passed to prohibit rate reductions. Therefore, I wish to be recorded as voting for the approval of schedule 4-A proposed by the utility naming 20 cents per M. cubic feet for the first 300,000 cubic feet, and 15 cents per M. cubic feet for all over, which is almost one hundred per cent lower than the rates ordered established by the majority of the commission.

Leonard C. Young, Commissioner.

[fol. 110] STIPULATION

That it was stipulated in open court before the Examiner by counsel for plaintiff and counsel for defendants that the qualified denial of defendants, set forth in their Answer with reference to paragraph IX of the Bill of Complaint is intended to deny and may be construed only as raising the issue as to whether or not the plaintiff herein has complied with Section 3 of the franchise ordinance, same being attached as Exhibit "A" to Bill of Complaint herein, and that otherwise the said denial is not intended to raise any issue as to plaintiff's compliance with other terms contained in said franchise ordinance.

Testimony of R. O. MacPhillips

Whereupon R. O. MACPHILLIPS was duly sworn and testified upon behalf of the plaintiff, as follows:

Direct examination:

My name is R. O. MacPhillips; I have been connected with the Great Northern Utilities Company as superintendent for about nine years continuously last past, with headquarters at Shelby. I have continuously resided in Shelby during these nine years and maintained my home and residence there. I have been in active charge of the Great Northern Utilities Company property at Shelby, as distinguished from property of this company elsewhere during all of the period since October, 1928, when and after the competitive

situation developed here in Shelby. I have prepared for this hearing an exhibit showing the gas mains in place of the Great Northern Utilities Company and Citizens Gas Company and the status of customers attached to each of the lines of the companies.

The exhibit, which has been identified by the reporter as Plaintiff's Exhibit No. 2, consists of two sheets, sheets 1 and 2, and the said exhibit correctly shows of my own knowledge the situation with reference to the gas line of the competing company and the present status of customers attached as of the date of the map, to-wit, September 9, 1932.

[fol. 111] The map of the City of Shelby is a tracing made by myself; the mains of the Great Northern Utilities Company were drawn on the exhibit from information taken from the company's records; the mains of the Citizens Gas Company were drawn in from information from my personal knowledge. I also have personal knowledge of the mains of the Great Northern Utilities Company. I was present when all of them were installed and have superintended them since their installation. I have personally observed the status of the mains of the Citizens Gas Company and have followed that installation closely as it was being prosecuted.

On plaintiff's exhibit No. 2, the mains of the Great Northern Utilities Company are represented by solid black lines and the mains of the Citizens Gas Company are marked by broken dotted lines. Meter installations of the Great Northern Utilities Company are represented by a circle and the meter installations of the Citizens Gas Company are represented by a cross. Wherever there appears upon the exhibit a cross surrounded by a circle, that signifies that is a customer that the Citizens Gas Company has attached to its system that was never served by the Great Northern Utilities Company. By that I mean new gas users, representing wholly new business to the Citizens Gas Company which at no time were served by the Great Northern Utilities Company. The customers of the Citizens Gas Company designated by a cross on this exhibit, represent customers formerly belonging to Great Northern Utilities Company which were taken by the Citizens Gas Company between the time the competition commenced in October, 1928, and the

date of the map. This information, of course, changes and changes may occur while this very hearing is going on but the exhibit is true in this respect as of the date of the map.

With reference to extensions and additions to its mains, Citizens Gas Company has added to their mains since July, 1930.

Referring to plaintiff's exhibit No. 2, the main over Blaine Avenue was extended from the corner of North Granite [fol. 112] Street for an approximate distance of 300 feet. The main on Second Street South was extended from the alley east of First Avenue approximately 450 or 500 feet. These mains are uniform in size and character to the main system to which they are attached. There have not been any extensions by the Great Northern Utilities Company since July, 1930. There have been two small extensions by the Great Northern Utilities Company since competition started; these extensions total in footage approximately 200 feet all told.

From this map, plaintiff's exhibit No. 2, I have prepared a calculation as to the number of customers shown on the map attached to the Citizens Gas Company line. We show as of September 9, 1932, 272 meters installed by Citizens Gas Company, of which number 28 were customers never served by Great Northern Utilities Company, leaving as of September 9, 1932, 244 meter installations representing meters taken from Great Northern Utilities Company by Citizens Gas Company. On September 9, 1932, Great Northern Utilities Company had installed 359 meters, all but six of which are shown on the map; the six not shown upon the map are at the power plant of the Great Northern Utilities Company and are not shown for that reason.

Cross-examination:

The 359 meters, less the 6 that are at the power plant approximately represent the number of separate customers that are attached to our system as of September 9th. In a few cases there are two meters set for the same person. In the case of a customer going good for another man's bill, one is set in his name and in four or five cases, the garage meter is set near the house. I would say that on September

9th, we had 353 separate consumers. Sheet 2 of Plaintiff's exhibit No. 2 fits together with sheet one to form a complete map and they come together on Fifth Avenue.

Referring to the two extensions that have been built by the Citizens Gas Company since July, 1930; these two exten- [fol. 113] sions serve three consumers to my knowledge, two of whom were formerly connected to our system. I have overlooked one extension on sheet two in my direct testimony. There is another extension of approximately 700 feet which may be described on the map as located on Ninth Street starting from the alley north on Main Street, thence north. In giving distances as to the length of the extensions testified to, I have only estimated the distances by using the scale of the map which is a scale of one inch to 100 feet.

Redirect examination:

On the Ninth Avenue extension of approximately 700 feet, there are two consumers who belong to the Citizens Gas Company, one of these consumers was formerly served by the Great Northern Utilities Company and one was not.

Whereupon plaintiff offered in evidence plaintiff's exhibit No. 2, consisting of two sheets, and in connection with the offer requested leave to substitute for the tracing marked as Exhibit No. 2, three blue prints, which was granted, and plaintiff's Exhibit No. 2 was received in evidence subject to the general objection to the introduction of testimony made by the defendants at the commencement of the taking of the testimony, which said Exhibit No. 2, is herewith next correctly reproduced as follows, to-wit:

(Here follows Plaintiff's Exhibit No. 2, side folios 114 and 115)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

[fol. 116] Testimony of E. R. Foster

Whereupon E. R. Foster was duly sworn and called as a witness on behalf of plaintiff and testified as follows:

Direct examination:

My name is E. R. Foster; I reside in Chicago, and I am connected with the Great Northern Utilities Company through the William A. Baehr organization. I am in charge of rates and valuations of all the property operated by the William A. Baehr organization, of which the Great Northern Utilities Company is one. I am the same E. R. Foster who testified in Federal Court in the Great Falls Gas case and I am the same E. R. Foster who testified on the second hearing before the Commission in this proceeding. I have prepared for this hearing a certain exhibit illustrative of the competitive situation and likewise the operating end since 1928, and prior to that time. These exhibits have been personally prepared by me upon data or information that comes from the books of the company, which books were in my hands for the purpose of preparing these exhibits and which books are here in this room at this time for examination.

The exhibit, which the reporter has marked Plaintiff's Exhibit No. 3, was prepared by me and my analysis of it and my conclusions are as follows:

This exhibit shows the revenues and expenses of the gas department of the Great Northern Utilities Company from the year 1923 by calendar years, including the year 1931, also the same for the first seven months of 1932. The top line shows operating revenues from the sale of gas; total revenue from the sale of gas. Next is shown the operating expenses exclusive of taxes and exclusive of depreciation. Next is shown the taxes paid by the company exclusive of Federal Income Tax; then is shown the total expenses excluding the depreciation; next is shown the net operating [fol. 117] revenue before depreciation has been deducted. The Federal Income Tax by years has been shown next; and after deducting Federal Income Tax year, the total amount available for return and depreciation has been indicated. Below this statement is shown the meters in use on January 1, 1923, and at the end of each of the periods

indicated. The thousands of cubic feet of gas purchased has been indicated for each period; also the amounts of gas sold; the thousands of cubic feet, the amounts used by the company, the amounts transferred to the electrical department, and the amounts unaccounted for. The unaccounted is also indicated in per cent. This exhibit shows that the gas sales and revenues, also the number of customers built up steadily from the time the property was first put into operation which was just shortly prior to 1923, shows a steady increase in all of these items until the year 1929—I should say the year 1928 when competition developed in the fall. Sales, gross revenue and net revenue show a drop in 1928 as compared with the year 1927 because of two rate reductions, and also because of loss of customers and sales due to competition developing late in the year, the year 1929, and thereafter shows a decided drop in sales, revenues and customers. During the year 1931, there was some increase in the number of meters in use, but regardless of that fact, the sales were lower than the year 1930, and also the revenues were lower than during the year 1930.

The red figures in the line noted as net operating revenues indicate that the company did not take in enough money from the sale of gas to pay for the cost of gas, and actual operating expenses, that is, expenses for labor and maintenance, etc. The exhibit, which the reporter has identified as Plaintiff's Exhibit No. 4, was prepared by me. This exhibit shows the various gas rates that have been in effect for the Great Northern Utilities Company since January 15, 1923, which was very shortly after gas was first turned on; these various rates are shown and also the date when the various rates became effective. The first three schedules [fol. 118] on the sheet were approved by the Public Service Commission, the last two were not. The last two represent schedules in effect since this rate competitive controversy commenced, and the last schedule, effective September 1, 1931, was put into effect following the issuance of the temporary injunction by the Federal court.

I have prepared a study showing the effects of the application of the 25-cent rate prescribed by the commission to actual operations of the company since the commencement of the competition. I also prepared the exhibit which the reporter has identified as Plaintiff's Exhibit No. 5, sheets

one and two. Page one of this exhibit is a study of the allowances for depreciation and return based on the commission's order No. 1530. On page 15 of the commission's order No. 1530, the Commission found the value of the property as of January 1, 1928, a total of $43,214.22. This figure represents the found value of the property of the gas department of the Great Northern Utilities Company at Shelby. To that value has been added the net additions during 1928, taken from the company's records, so that a total value in property has been found, based upon the commission's order at the first of the year, 1929, this amounted to $47,179.10. The value of property on this same basis has been indicated for each of the years 1930, 1931 and 1932. The additions to property during the years 1929, 1930 and 1931, also for the first seven months of 1932, have been indicated. These figures have been taken from the company's records based upon the valuation figures as indicated for each year, depreciation has been computed at the first of the year based upon the commission's order No. 1530. The commission allowances for the depreciation was 8 per cent on all except land at $1,300.00, which item of land was of the value of $1,300.00, and working capital of $2,500.00, which was the value assigned to that element by the commission.

Depreciation on the net additions during the year have been computed at 4 per cent; on some additions assuming [fol. 119] that they were added uniformly during the year. They are very small at any rate, so that not much money is involved. Then the total for depreciation has been indicated; the return upon the property has been computed at 8 per cent, which is in accordance with the Commission's order No. 1530. This computation has been carried out just as was explained for the item of depreciation; total sales of gas in M cubic feet for each of the periods has been indicated. Then the amounts per M cubic feet sold has been computed for each of the items of depreciation and return as explained above. Page No. 2 is a study showing the deficit for three years and seven months based upon the rate found and the allowance for depreciation and return as indicated in Commission Order No. 1530. In this study for each of the three calendar years and for the seven months period of 1932, the sales in M cubic feet have been

indicated; also the operating expenses in some detail have been indicated for each period in total dollars, and in dollars per M cubic feet sold. The "M" cubic feet means, of course, per thousand cubic feet of gas.

The operating expenses have been set up with the cost of gas shown separately. The allowance for depreciation and return based on Commission Order No. 1530 have been transferred from page 1 of Exhibit No. 5, and these allowances have been added to the total expenses for each period. Total required revenue then as computed is indicated for the year 1929 as .4299 dollars per M cubic feet; for the year 1930, .4205 dollars per M cubic feet; for the year 1931, .4824 dollars per M cubic feet, and for the seven months period ending July 31, 1932, .4367 dollars per M cubic feet. That is the revenue which would be required to discharge the expenses and depreciation and return as given in this exhibit, in accordance with the commission's rulings.

Next has been set down the total revenue which could be expected for each of the periods based upon the rate set up in Commission's order No. 1530. The commission found that the rate which they specified would produce an average [fol. 120] of 27 cents per M cubic feet sold. This figure has been used for each of the periods and the total revenue has been computed by using that average price applied to the actual cubic feet sold by the company at each period. At the bottom of the exhibit is shown the deficit which resulted and which amounts to .1599 dollars per M cubic feet for the year 1929; .1505 dollars for the year 1930; .2124 dollars per M cubic feet for the year 1931; and .1663 dollars per M cubic feet for the seven months of 1930. It should be pointed out that on page 1 of this exhibit for the seven months period of 1932, depreciation allowances, and allowances for return, is on a basis of seven months, not on an annual basis, which is to make it correspond with the actual periods shown.

"Q. What conclusion do you draw from that exhibit? (referring to Plaintiff's Exhibit No. 5).

"Mr. Silver: At this time we object to the witness drawing any conclusion from this exhibit on the grounds and for the reasons that the complaint in this case does not raise any issue as to the reasonableness and justness or confiscatory character of the rate prescribed by the Commission, in

Report and Order No. 1530, Plaintiff's Exhibit No. 1 introduced herein on the ground that the question of confiscation has not been raised by the complaint excepting as to the right of the plaintiff in this case to charge a rate, or schedule of rates lower than the rates or schedule of rates fixed by the Commission in its Report and Order No. 1530, Plaintiff's Exhibit No. 1.

"Mr. Gunn: We desire to state that while Circuit Judge Sawtelle in his opinion found that the complaint does present the question of confiscation, that we intend at the hearing of this cause to present an amendment to the Bill of Complaint specifically charging confiscation."

This exhibit indicates that if the rates prescribed by the Commission had actually been charged during these periods, the company could not have earned enough to pay operating expenses, including the depreciation and have left a net amount which would produce a fair return based upon the valuation found by the Commission.

The operating expenses would include cost of gas, depreciation, and all other expenses. Referring to the first column of sheet two of plaintiff's Exhibit No. 5 for the year 1929, we have expenses, a total of $17,425.96; then under the total we have cost of gas $6,750.82. That figure is in [fol. 121] addition to the total. The total expenses include the cost of gas; the proportion of the expense has been segregated above so that the cost of gas sold could be clearly shown here and it is a part of operating expenses.

"Q. Then your total expenses, including cost of gas for the year 1929, for example, are what in dollars?

"Mr. Silver: Now, we make the same objection to this question that we made to the former question and we want it understood that it goes to all questions relating to what the expenses of the Utilities Company would have been under the Commission's prescribed rate. Is that agreeable?

"Mr. Toomey: That is agreeable. I simply want to classify them for the purpose of the record."

Whereupon the witness, in answer to questions propounded to him by plaintiff's counsel gave the following further testimony, subject to the objection above noted.

Taking the year 1929, for example, our total expenses for that year, including cost of gas purchased, was $24,176.78. Our total revenues for that year, applying the commission rate, would be $19,753.34, so that we would fall in dollars $11,669.64 short of meeting the requirements fixed by the commission, that is, after allowances for depreciation and return have been added to the expenses.

That is based on the quantity actually sold.

I prepared the exhibit which the reporter has identified as Plaintiff's Exhibit No. 6. This study is for simplicity; there has been set up in cents per M cubic feet in Plaintiff's exhibit No. 5, the actual operating expenses of the company, excluding cost of gas that had been used for each of the years in question.

"Mr. Silver: Pardon the interruption. I see from the Exhibit that this relates to rates for returns earned under the rate prescribed by the Commission. I desire to renew the same objection made to the testimony of the witness in this respect and may the understanding be that all questions with reference to Exhibit No. 6 go in subject to that objection.

"Mr. Toomey: So agreed."

Whereupon the witness, in answer to questions propounded to him by plaintiff's counsel gave further testimony with reference to plaintiff's Exhibit No. 6, subject to the objection of the defendants immediately above noted. [fol. 122] The actual operating expenses of the company per M cubic feet as shown in Exhibit No. 5 are materially higher than the estimated expenses which the Commission included in its Order No. 1530. On page 25 of that order the Commission states that the company should be able to operate so that all of its expenses excluding cost of gas should be approximately .1354 dollars per M cubic feet sold. In Exhibit No. 6, operating expenses excluding cost of gas and depreciation have been set up at the figure specified by the commission; to that figure has been added the actual cost of gas per M cubic feet sold as taken from the company record. The depreciation allowance and the allowance for return upon the property have been transferred from Exhibit No. 5, and each of these for each of the periods shown are based upon the Commission's valuations

as indicated in Order No. 1530 for the years 1929 to 1931 inclusive, and the seven months period of 1932. Total requirements for all expenses including cost of gas plus fair allowance for depreciation and fair rate on return, have been computed. Comparing these requirements for each period with the average revenue which the Commission said would result from their rate schedule as ordered, we find that there is a deficit for the year 1929 of .0571 per M cubic feet; for the year 1930 a deficit of .0549 dollars per M cubic feet; for the year 1931 a deficit of .0960 dollars per M cubic feet, and for the seven months period ending July 31, 1932, a deficit of .0723 dollars per M cubic feet sold.

For the seven months ended July 31 1932, the application of the commission's rate to actual gas sales for the same period show that these rates are running about 7¼ cents per M cubic feet under that which would be necessary to wipe out the deficit.

I might add that this study was prepared to show what might result if all the estimates made by the Commission were applied with the exception of cost of gas, a point which is an actual fact; there may be some question about operating expenses at any time and consequently I have set [fol. 123] up the estimated expenses as indicated in the Commission's order. The only thing that is different from those estimates in the Commission's order is the cost of gas, is the amount actually paid per M cubic feet during these periods.

In compiling plaintiff's Exhibits Nos. 5 and 6, I followed in general the same methods the Commission followed in its Report and Order No. 1530 in building the rate. With reference to sheet 2 of Exhibit No. 5, these revenues resulting from the application of the Commission's rate are and being $17,753.34 for the year 1929; $18,191.25 for the year 1930; $15,090.03 for the year 1931; and $10,681.07 for the seven months ending July 31, 1932, may be compared against the total expense figures exclusive of cost of gas for the same year and shows just a slight coverage of the expenses plus taxes, with nothing for cost of gas, and nothing for depreciation, and nothing for fair return.

Whereupon plaintiff in connection with examination and testimony of witness Foster offered in evidence plaintiff's exhibits Nos. 3 to 6, inclusive.

Whereupon the defendants made the following objection:

"Mr. Silver: Except the general objection interposed at the commencement of this case, there is no specific objection to either exhibits Nos. 3 nor to No. 4. Now as to Exhibits numbered 5 and 6, and to each of them, the defendant interposes the objection that the evidence is not germane to any issue raised by the pleadings; that the complaint does not complain that the rates prescribed by the Commission are or were confiscatory; complaint merely contending that the plaintiff has the right to charge any rate or set of rates under the schedule of rates prescribed by the Commission."

Whereupon, and subject to defendants' objection as above noted, plaintiff's exhibits Nos. 3 to 6, inclusive, were received in evidence by the Examiner and are in words and figures as follows, to-wit:

(Here follows Plaintiff's Exhibit No. 3, side folio 124)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

[fol. 125] PLAINTIFF'S EXHIBIT NO. 4

Great Northern Utilities Company, Shelby, Montana
Natural Gas Rates

	Net
Effective Jan. 15, 1923	$1.00 per M. c. f.
First 5,000 cu. ft.	.80
Next 10,000 " "	.60
Next 20,000 " "	.45
Next 35,000 " "	.35
Next 80,000 " "	.30
Over 150,000 " "	
Min. Bill, $1.50.	

Effective Jan. 1, 1924	Net
First 5,000 cu. ft.	.60 per M. c. f.
Next 5,000 " "	.55
Next 10,000 " "	.45
Next 30,000 " "	.40
Next 250,000 " "	.35
Over 300,000 " "	.30
Min. Bill $1.50.	

Effective Nov. 25, 1927	Net
First 10,000 cu. ft.	.50 per M. c. f.
Next 10,000 " "	.45
Next 30,000 " "	.40
Next 250,000 " "	.35
Over 300,000 " "	.30

Effective Nov. 1, 1928	Net
First 300,000 cu. ft.	.20 per M. c. f.
Over 300,000 " "	.15
Min. Bill $1.50.	

Effective Sept. 1, 1931	Net
All Gas Used	.15 per M. c. f.
Min. Bill $1.50.	

[fol. 126]

PLAINTIFF'S EXHIBIT NO. 5
Sheet 1

Great Northern Utilities Company, Gas Department Only

Study of Allowances for Depreciation and Return Based on Montana Commission Order #1530

		1929	1930	1931	1932 to July 31st
Value of property as of 1-1-28 p. 15, Commission order #1530	$43,214.22				
Net Additions during year 1928 from company records	3,964.88				
Total at first of year		$47,179.10	$47,573.33	$48,618.55	$48,790.73
Net additions during year		394.34	845.11	172.18	r534.60
Depreciation on Value at 1st of year as allowed in Commission Order #1530. (8% on all except Land at $1,300, plus Working Capital at $2,500)		$3,470.33	$3,501.88	$3,585.16	*$2,093.74
4% on net additions during year		15.77	33.80	6.89	r1.25
Total for depreciation		3,486.10	3,535.68	3,592.05	2,092.49
Return on Value at 1st of year as allowed in Commission Order #1530 (8%)		$3,774.33	$3,805.88	$3,889.48	*$2,276.90
4% on net additions during year		15.77	33.80	6.89	r1.25
Total for return		3,790.10	3,839.68	3,896.37	2,275.65
Total Sales, M. Cu. Ft		73,160.5	67,375.0	55,889.0	39,559.5
Depreciation per. M Cu. Ft		.0518	.0570	.0697	.0575

*—Based on 7 months.
r—red.

[fol. 127] Exhibit No. 5, Sheet 2

Great Northern Utilities Company, Gas Department Only

Study Showing Deficit for Three Years and Seven Months Based on Rate Found and Allowances for Depreciation and Return in Commission Order #1530, Together with Actual Operating Expenses from Company Records

	1929		1930		1931		1932 to July 31	
	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.
M. Cu. Ft. sold	73,160.5		67,375.0		55,889.0		39,559.5	
Expenses:								
Transmission and Distribution	$2,339.76	$.0320	$2,342.97	$.0348	$1,843.97	$.0330	$714.05	$.0181
Commercial	3,229.60	.0442	2,679.47	.0398	1,846.97	.0331	912.71	.0231
General	8,987.64	.1228	8,287.37	.1230	8,071.19	.1444	5,385.04	.1361
Undistributed	1,166.42	.0159	1,247.85	.0185	1,307.75	.0234	1,456.71	.0368
Taxes	1,702.54	.0233	1,007.14	.0149	1,002.18	.0179	606.25	.0153
Total	17,425.96	.2382	15,564.80	.2310	14,072.06	.2518	9,074.76	.2294
Cost of gas	6,750.82	.0923	5,388.99	.0800	5,399.28	.0966	3,816.80	.0965
Total expenses	24,176.78	.3305	20,953.79	.3110	19,471.34	.3484	12,891.56	.3259
Depreciation based on allowance by Montana Commission in Order #1530	3,486.10	.0476	3,535.68	.0525	3,592.05	.0643	2,092.49	.0529
Fair return based on Montana Commission Order #1530	3,790.10	.0518	3,839.68	.0570	3,896.37	.0697	2,275.65	.0575
Total Required Revenue	31,452.98	.4299	28,329.15	.4205	26,959.76	.4824	17,259.70	.4363
Estimate Revenue based on rate p. 26 of Commission Order #1530 (Av. Price $27 per M. c. f.)	19,753.34	.2700	18,191.25	.2700	15,090.03	.2700	10,681.07	.2700
Deficit	11,699.64	.1599	10,137.90	.1505	11,869.74	.2124	6,578.63	.1663

[fol. 128] PLAINTIFF'S EXHIBIT No. 6

Great Northern Utilities Company, Gas Department Only
Study Showing Application of Montana Commission Report and Order #1530 to Actual Sales of Gas for Past Three Years

	Per M. cu. ft.			
	1929	1930	1931	1932 to July 31
Operating expenses exclusive of cost of gas purchased and depreciation allowance (p. 25 of Order #1530)	$.1354	$.1354	$.1354	$.1354
Actual cost of gas from company records.	.0923	.0800	.0966	.0965
Depreciation allowance at 8%, based on Commission Order (p. 25 of Order #1530)	.0476	.0525	.0643	.0529
Rate of return at 8% based on Commission Order (p. 26 of Order #1530)	.0518	.0570	.0697	.0575
Total requirement	.3271	.3249	.3660	.3423
Average revenue which will result from application of rate schedule ordered by Commission (p. 26 of Order #1530)	.2700	.2700	.2700	.2700
Deficit	.0571	.0549	.0960	.0723

[fol. 129] Cross-examination:

Referring to Exhibit No. 3 and the fact noted thereon that the amount of gas transferred to the Electrical Department has been increased from year to year, this may be accounted for by increase in generation at the Great Northern Utilities Company Electric Department generating electricity here in Shelby supplying the town of Shelby with electricity, serving the towns up through the oil fields to the north; also Coutts in the Province of Ontario (sic); serving Cut Bank and serving the small towns as far as Glacier Park; that would include Blackfoot and Browning. The oil towns that I referred to are Oilmont, Kevin, Sunburst, Sweet Grass, and the scattered customers through the field. The revenue that comes to the Gas Department for this gas that is transferred from the Gas Department to the Electrical Department, is not included in Operating Revenues shown on Exhibit No. 3.

The Electrical Department settles with the Gas Department for the gas transferred on this basis—the gas transferred is paid for at the gate rate prescribed. In other words, that is a transfer. We pay so much at the city gate for our gas and the price that we pay for the gas at the city connection is the price at which the Electrical Depart-

ment settles with the Gas Department. The Electrical Department takes delivery of its gas at the electric plant which, I judge, is about a half mile from the gateway. The Electrical Department is served by a separate pipe line which takes off of the regular distribution system of the Great Northern Utilities Gas Department.

The rate shown on Exhibit No. 4, effective September 1, 1931, is a straight rate of 15 cents per M cubic feet. This rate was put into effect after the interlocutory injunction in this proceeding was granted and was without any reference to the commission's approval or disapproval. We did not even file such a rate with the commission.

In Exhibit No. 6, I show the average revenue which will result from application of rate schedule ordered by com- [fol. 130] mission in Report and Order No. 1530 of 27 cents per M cubic feet. That was the estimated figure used by the Commission. I have not in this exhibit nor any of my exhibits applied the schedule of rates prescribed by the Commission to the actual consumption as shown by the consumers' ledgers, to determine what would have been the actual experience of the utility had it applied the Commission rate. That would be a big job. It was done at the time the 27 cent rate was estimated. Mr. Buck made that rate, consequently, I know that is what it came from. That applied to our consumption prior to the estimate, in 1928 and along in there.

The Operating Expenses shown on the same exhibit as estimated by the Commission at $.1354 per M cubic feet is an average of the operating expenses of our utility—gas department—over the period of years of its existence. The Operating Expenses for a thousand cubic feet of gas sold naturally varies with consumption. Generally, it is true that as you increase your consumption it makes the cost smaller per M cubic feet; and the larger percentage sold would tend to make a lower figure for the M cubic feet cost.

Redirect examination:

The practice of furnishing gas by the Gas Department to the Electrical Department of the utility was in force and followed when Report and Order No. 1530 was issued by the Commission. I believe that practice has been in effect since the Electric Department has been furnished

with gas. There has been no deviation from that and I think that none has been required by the Commission to the contrary.

The investment devoted to that service is very small and at the present time with a flat gate rate, the only effect which this transfer could have would be that none of the unaccounted for gas has been allocated against the Electrical Department.

The Electrical Department is not treated as a customer. If a portion of the unaccounted for gas was charged against [fol. 131] the Electrical Department, then it would be treated as a customer. We have not done that. I do not know exactly how the physical connection is made for the Electrical Department of my own knowledge.

In adopting the revenue and expense figures which I had in the preparation of Exhibits Nos. 5 and 6, I have in Exhibit No. 6 used the same figure employed by the Commission in Report and Order No. 1530 per M cubic feet, expenses per M cubic feet of gas sold, but in Exhibit No. 5 I have used the actual expenses from the company's records. So far as the ultimate effect is concerned, the result is a deficit in either case.

The reduction made by the company in September, 1931, to a 15-cent flat rate was made for the purpose of holding customers that the company had at that time and also it was made for the purpose of probably increasing the number of meters on the lines by offering at a cheaper price. The result so far as getting customers was concerned is that the meters attached at that time and at the present time indicate that there has not been much change. As a matter of fact there has been a slight loss for at the end of 1931, when there were 371 meters in use and in July 31, 1932, when there were 363, there was very small change there. The reduction has not been effective as far as bringing or attracting customers is concerned. Competition is still tight and keen.

Referring to the use of gas by the Electrical Department from the Gas Department, reference to which was made this morning, it is about 200 feet from the end of the distribution system to the electric plant. There is a pipe in there which is devoted exclusively to serving the electric plant. Assuming that no part of the present distribution system would be used to carry gas to the electric plant from

the city gate, it would take approximately 3,200 of pipe to cover the distance from the city gate to the electric plant, that is, to give them the sole and exclusive pipe line to the electric plant. If there was a separate line, it could be two inch. If there is sufficient pressure at the city gate to serve [fol. 132] the electric plant through a two-inch line, it would cost about 58 cents per lineal foot laid, making a total cost of approximately $1,800.00.

Gas is purchased from the Ohio Oil Company at the city gate; they deliver it in their own pipe to the city gate. They are not a public utility.

With reference to Exhibits Nos. 5 and 6, some question was raised respecting a customers' analysis. Report and Order No. 1539 of the Commission contained a customers' analysis prepared by Mr. Buck, the chief engineer of the Commission. The report had the summarization of the analysis. His analysis was for gas used for the year ended September 21, 1928, which was just before competition started, or about that time. His analysis, I would say, took no account whatever of the competitive situation but was made on the eve of that situation at a time when competition was imminent and actually coming into being at the time. Before the first of the succeeding year, the company had lost over 100 meters.

The Commission in Report and Order No. 1530, figured from the company's operations that our expenses were about 13.54 cents per M cubic feet, excluding cost of gas. That figure was taken from the history of the company's operations. We would have to get from the rate that 13.54 cents and then in addition, we would have to get something for cost of gas, depreciation, and a fair return.

Based on customers' analysis, the Commission concluded that we would have to get about 27 cents to take care of our expense of 13.54 cents, depreciation, a fair return, and cost of gas. In other words, the Commission figured that on an average through the whole body of customers, each thousand cubic feet of gas would have to yield 27 cents in order to pay the operating expenses, depreciation as figured by the Commission, and a fair return. From that figure, it was figured that a 35-cent rate would achieve that result, a 35-cent top rate on the basis of 120,000,000 cubic feet consumption annually, which was approximately the whole

[fol. 133] quantity sold in that community, exclusive of the electric plant in 1927.

As a result of the experience since competition commenced, and based upon my knowledge of the situation, I do not believe there would be a wide divergence from the average found if a customers' analysis at the present time were to be made. Customers' characteristics would be about the same today as they were at that time, that is, customers in this town use gas for heating and cooking and water heating and the same thing would be true now as it was at that time. The spread between the expense figures found by the Commission of 13.54 cents per M cubic feet exclusive of cost of gas and our figure, based on actual operation, is about 10 cents per M cubic feet. The actual expense, exclusive of cost of gas, has been in cents .2382 in 1929; .2310 in 1930; .2518 in 1931; and for the first seven months of 1932, .2294 cents. The figures just given are exclusive of cost of gas. The difference is widened when you take into account the cost of the gas sold, for the reason that the commission estimated cost of gas at 7 cents per M cubic feet less 10% unaccounted for gas which would make the cost of gas 7.77 cents per M cubic feet. As a matter of fact, the cost of gas has ranged from 8 cents per M cubic feet to about 9.66 cents per M cubic feet sold. The spread between the Commission's finding as to expense per M cubic feet and the actual results of our experience is so great that in my judgment it would not be affected at all by any change in the 27-cent figure. I think that can be indicated best by plaintiff's Exhibit No. 5, page 2, where the requirements during the four periods indicated, varies from 42.05 cents per M cubic feet sold to 48.24 cents per M cubic feet sold; that is the revenue requirement and the requirement of each of the periods is much greater than the top step of the rate set by the Commission, the top step being 35 cents per M cubic feet. Based on my Exhibit No. 5, we would have to get approximately on the average of 45 cents per M cubic feet as against the Commission's allowance of 27 cents average.

[fol. 134] Recross-examination:

This figure, 13.54 cents, being an average cost per M cubic feet of gas sold, found by the Commission upon the history of the company, excludes the cost of gas purchased.

It also excludes any charge of operating expenses for depreciation. At the time of the hearing before the Commission, the contract in existence between our company and the Ohio Oil Company for gas delivered at the city gate was for gas delivered at the following rate: first 5,000,000 cubic feet per month at 15 cents per M cubic feet net, all excess at 10 cents per M cubic feet net. We never had a supplementary contract for the 7 cent price. Your recollection is correct that at the time of the hearing which was held on our Schedule No. 4-A which called for a 20-cent base rate, the statement was made by our Manager, Mr. Sikes, that there was an agreement with the Ohio Oil Company under which the Great Northern Utilities Company was to purchase gas at the city gate at 7 cents per M cubic feet. There is no formal contract, there is an understanding that that is the price, and that is the rate that has been charged by the Ohio Oil Company to the Great Northern Utilities Company since the latter part of 1928. Other than unaccounted for gas, there is no other factor that enters into the cost of gas purchased that would increase that cost above 7 cents per M cubic feet.

Stipulation as to Evidence

Plaintiff and defendants, through their counsel, agreed in open court before the Examiner, that the Federal census in 1930 shows a population for the town of Shelby of 2,004.

Testimony of Walter Tillman

Whereupon Walter Tillman was duly sworn as a witness and testified on behalf of the plaintiff as follows:

Direct examination:

My name is Walter Tillman; I reside at Shelby, and I [fol. 135] am connected with the Citizens Gas Company as manager at Shelby, a position that I have occupied continuously since October, 1928. I am also secretary-treasurer of the corporation and as such have its books and records in my possession. The corporation is capitalized for

I think $100,000 divided into 50,000 shares of common and 50,000 shares of preferred. Approximately 8,300 share- of common have been issued and none of the preferred. The par value of the common stock is supposed to be a dollar. Of the 8,300 shares of common stock issued, none of it is held by residents of Shelby. There is some of it out in Calgary in Canada; some of it in Missouri, and some in Minnesota. None of the preferred stock is issued until it is paid for. It has been subscribed for. Out of a total of 50,000 authorized, 43,000 of the preferred has been subscribed for and about 80% of that 43,000 is held by citizens of Shelby. When their subscriptions to the preferred stock are paid for, the citizens have certain rights to the common stock, the arrangements being that approximately 42,000 shares of common stock will be divided equally among the 43,000 of the preferred stock subscribed, so that in any event 80 per cent of the common stock will also find its way into the hands of the citizens of Shelby, by citizens I mean those who are living here and are residents here.

The officers of the company are J. W. Williamson, President, Ray Larson, Vice President, and Walter Tillman, Secretary-Treasurer. They are all residents of Shelby. The directors are the three above named, together with Harry Seister and Tom Costello. Costello is no longer a resident of Shelby. He was a hotel man here and moved to Spokane. He was a resident of Shelby while he was a director and before he left here and he is still a director. He was a resid*id*ent of Shelby when he was elected.

J. W. Williamson, President of the company, is mayor of the municipal corporation of Shelby; I don't know exactly but I think he has been mayor for four years. Neither Ray [fol. 136] Larson nor any of the other directors are connected with the municipal corporation.

Williamson is connected with the School Board, a consolidated board of some kind covering both High School and Public School. He has been on that Board, I think about—over two years. The Citizens Gas Company sells gas to the City of Shelby, to the High School, and to the public school. All but about two of our stockholders or subscribers are customers. Their average subscriptions are $100.00, that is $100.00 subscribers.

The Citizens Gas Company is charging now 20 cents per M cubic feet with a penalty of 3 cents per M cubic feet if

not paid by the 10th of the month. Commencing with the company's event in October, 1928, the rate the company then charged was a sliding rate from 35 cents down to 12½ cents per M cubic feet. That remained in effect until January, 1930, when that rate was reduced to the 20 cent rate, this base rate. No change has been made since that date. This reduction has been submitted to the Commission but was never approved. The 35-cent rate was approved, that is, the first initial rate down to 12½ cents was approved by the Commission, but the 20-cent rate never was.

The Commission has not made any investigation of our rates that I know of or conducted any hearing at Shelby or elsewhere on our rates, or as to the value of our property or operation.

Cross-examination:

When I referred to our present rates, I referred to this schedule which has been shown and marked as having been received by the Railroad Commission on March 13, 1930. My attention is directed to the fact that this is a 23-cent per M rate subject to a 3-cent per M discount. That is right. My testimony will stand corrected that it is not a 20-cent rate plus a penalty. It is a 23-cent rate.

Redirect examination:

We are charging 20 cents here in town with the penalty [fol. 137] added to the bill if not paid on the 10th of the month. For instance, if the consumer uses 20,000 cubic feet of gas, there is attached on his statement a penalty of 60 cents if not paid by the 10th of the month, but the consumer -an acquit his obligation to the company by paying 20 cents flat. I do not have any bills with me or sample bill forms or printed forms. The company was not originally organized by residents of Shelby; it was agitated by residents of Shelby but it was not organized by them. When it was first organized, it was organized by Mr. Lilly with Minneapolis capital. Mr. Lilly was a resident of Shelby at that time. The company was purchased by citizens of Shelby from Lilly and his associates under an arrangement whereby citizens were to pay so much money down and the rest over a period of so many years; this money is payable to S. H. Bowman, Trustee, of Minneapolis. That was the obligation of the Citizens Gas Com-

pany to Bowman, the obligation of the corporation. None of the citizens of Shelby are sureties or guarantors on the corporation's obligation to Bowman.

Recross-examination:

When the company was formed in the fall of 1928, it was financed by Minneapolis money. The local interests undertook to purchase from the Minneapolis interests their interest in the Citizens Gas Company in April 1931. Up until that time, the Citizens Gas Company was owned by Minneapolis interests. There are 43 subscribers to the capital stock, either preferred or common of the Citizens Gas Company among the citizens of Shelby and of those 43, all but two are consumers. The company does have outstanding mortgage bonds that were executed to S. H. Bowman, as trustee, to secure the purchase price.

Redirect examination:

The subscriptions to the preferred stock were made in April 1931, and the subscriptions to the preferred carried rights to the common with them.

[fol. 138] Whereupon plaintiff rested and thereupon the defendants made the following motion:

"Mr. Silver: Comes now the defendants, and each of them, and moves that all of the testimony of the witness Foster relative to the application of the commission's prescribed rate in its Report and Order No. 1530, and the estimated earnings thereof, and all evidence concerning exhibits numbered 5 and 6, and each of the said exhibits be stricken from the record on the grounds and for the reasons that the same do not tend to support any issues tendered by the complaint herein, are wholly irrelevant and immaterial. On the further ground that the question of the confiscatory character of the rates prescribed by the Commission in its Report and Order No. 1530 are nowhere put in issue by the complaint herein."

Defendants' Case

Stipulation as to Evidence

It was stipulated between plaintiff and defendants, acting by and through their counsel, that the complaint filed

with the Public Service Commission by the said Citizens Gas Company, protesting schedule 4-A submitted by Great Northern Utilities Company, referred to in paragraph XIX of the complaint herein, was, without any public hearing having been held thereon, dismissed by the Public Service Commission of Montana.

It was further stipulated that the franchise ordinance and the franchise granted by the ordinance numbered 82 attached to the Bill of Complaint as Exhibit "A", running to Forrest P. Williams, his associates and assigns, was granted by the City of Shelby after due compliance with the provisions of Sections 5074 and 5077, Revised Codes of Montana, 1931, pertaining to the granting of franchises by incorporated cities and towns, and that it is a valid ordinance.

It was also stipulated that the franchise of the Citizens Gas Company, originally granted under Ordinance No. 108 to the Shelby Oil and Gas Company, its associates and assigns, was granted by the City of Shelby, after due compliance with the provisions of Sections 5074 to 5077, Re-[fol. 139] vised Codes of Montana, 1921, said ordinance being pleaded as Exhibit B to the Bill of Complaint.

It was further stipulated that the State of Montana, either acting as the state or through any of its political sub-divisions, has not attempted to subject the Great Northern Utilities Company to the penalty prescribed by section 3908 and section 3888 of the Revised Codes of Montana, 1921.

Whereupon WALTER TILLMAN was recalled on behalf of defendants and testified as follows:

Direct examination:

I am the same Mr. Tillman who testified on behalf of plaintiff here just a few moments ago. I will state for the record the amount of gas sold by the Citizens Gas Company to each of its consumers for the years 1928, 1929, 1930 and 1931, as follows: for the three months of the year 1928, 12,884,980 feet; as of December 31, 1928, we had 187 customers. In 1929, we sold 76,745,800 feet, and had as of December 31, 1929, 213 customers. In the year 1930,

we sold 76,649,000 feet to 251 customers. In the year 1931, we sold 76,749,000 feet to 244 customers. For the seven months of 1932, there was sold 67,599,000 cubic feet to 269 customers.

We have 269 customers at the present time, all residing in Shelby.

Our cost of operations per thousand cubic feet of gas sold for the various years above referred to, excluding the cost of gas purchased and the expenses of depreciation are as follows: For the year 1929, our total expenses, less cost of gas purchased and depreciation, was $12,471.15, making the cost per M cubic feet .165 dollars. For the year 1930, total expenses were, less cost of gas and depreciation, $8,854.59, making cost per M cubic feet of .106 dollars. For the year 1931, total expenses, less cost of gas and depreciation, were $9,509.06 making a cost per M cubic feet of .123 dollars. For seven months in 1932, our total expenses, less cost of gas and depreciation, were $5,536.76 making a cost per M cubic feet of .092 dollars.

[fol. 140] Our cost of gas purchased for those years was 3 cents per thousand cubic feet. This is the delivered price at the mouth of the well, and all of the expenses from the mouth of the well into the City of Shelby, and all expenses incurred in the distribution of that gas, are included in the figures I have given as cost of operations other than cost of gas purchased and depreciation.

Cross-examination:

For the year 1929, I said our total expense, less depreciation, in dollars was $12,471.15. The details of that $12,471.15 include distribution $980.24, which covers the expenses apportioned to the distributing system, repairs and maintenance within the town. The expense of the line to the field was $628.72; included in that is car hire, changing meters or changing charts of the meters, and looking after trips to the wells. This $628.72 is a part of the $12,471.15. The basis of apportionment between the town and field lines is that there is a charge of 10 cents per mile for the car, so much time for the man going out—in the winter time it takes three or four hours, in the summer time, maybe half an hour. Both of the above-mentioned sums, $980.24

and $628.72 are under the item of distribution and that is all under that item.

My next figures going into this total $12,471.15 is general operating expense or $5,637.99; that item consists of officers' salaries $4,089.30, which amount is payable to myself as manager, the remainder of that figure of $5,637.99 covers office supplies and expenses. The item $202.46 covers printing, pencils, stamps and stuff like that.

Under the item of general operating expenses is law expense amounting to $1,063.74; our lawyer gets that. Miscellaneous general expenses go in that, it amounts to $282.49; that covers donations, advertising and things like that, making a total of $5,637.99, for general operating expenses.

My next item of this $12,471.15 is collection expense of [fol. 141] $129.30. That expense is incurred in collecting bills. It does not cover reading meters. There is no labor expense in that, it merely covers the man's time in making collections.

Another item is commercial expenses, $499.42. I will bring the girl down with the books to inform you who gets that and what it is for; that does not include the salary of the bookkeeper.

Another item in that $12,471.15 is maintenance of meters, $36.57. Maintenance of distribution system, buildings, fixtures and grounds, $1.30. Operation water distribution system, labor $552.65 covers labor on the distribution system, repairs, and checking upon walking over the lines looking for leaks. Customers' premiums expense, $4,365. Distribution supplies and expenses, $71.50; maintenance of mains, $78.61; maintenance of services, $195.80; interest on funded debts, $2,274.96. The funded debt was $30,000 at 7 per cent—7 per cent on 30,000 dollars—and there is interest on floating debt $56.78—I do not know just how much the floating debt is. It was at the rate of 8 per cent.

Another item going into the figure $12,471.15 is miscellaneous deductions of $1,329.00. That sum is for amortization of franchise; amortization and organization and franchise. Those items were set up on the basis of a monthly charge of 1/456th of $50,500, representing the time before expiration of franchise from date of receipt.

We have set up a property element in our valuation of $50,500, covering organization of franchise, franchise $500,

organization $50,000. To that we add our investment for plant and equipment which is about $46,000. The above does not give all the elements of this $12,471.15. Taxes are $1,180.48, that is state and county; there were no Federal Income taxes for the year 1929, nor in 1930, nor in 1931. We have not paid Federal Income taxes because the figures are showing in red. figures did not show in red for all those [fol. 142] years; in 1929 it shows a profit of $1,419.82; in 1930, a profit of $1,8475; in 1931, a deficit of $1,064.71.

I think I have given the total of our expenses making up the expense item of $12,471.15 in 1929.

The profits I referred to, are after the interest charges that I have detailed, and after depreciation is taken out and the cost of gas. We had for depreciation $5,426.50 and we had taxes of $1,180.48, cost of gas $2,292.84, total for the year 1929, expenses, depreciation, taxes and cost of gas, $11,-103.25. The figure given of $12,471.15 was operating expenses, less depreciation and cost of gas at the well. Depreciation is $5,426.50, cost of gas $2,292.84, making a total of $20,190.49 for 1929. Our revenue for that same year was $21,675.24.

We have a bookkeeper which we pay $125. per omnth. We did have a bookkeeper in 1929 which we had at that rate; this is not found in the books, it comes out of my salary, out of the $4,089.30 above mentioned. We do not have any office rent. The office is maintained in my own building, The Tillman Plumbing Shop. We do not have any real estate taxes. There is a few dollars on the building on the north side amounting to about $5.00 per year.

We did pay in 1929 taxes of $1,180.48, including county and city. I do not have any idea without looking it up what the city taxes are separately.

We were charging the 35-cent rate in 1929. Had we been charging the 20-cent rate, we would have come out in the red.

Taking this last full year, 1931, this total of $25,190.49, does not include any interest, that is—interest on funded debt. In the figures given for 1929, interest on funded debt is included in the expense total of $12,471.15. Taking 1931, our total operating expenses for that year were $14,201.72, that includes depreciation and cost of gas. Depreciation in the amount of $5,465.76, and gas purchased in the sum of

[fol. 143] $3,270.47. We figured depreciation at the rate of 12½ percent a year which figures $14,201.72, including taxes. Our revenue in 1931 was $15,910.39. When I say we figured 12½% a year depreciation, I meant we figured 12½ per cent flat on the whole investment. By that I mean 12½ per cent of physical property—tangible property—the actual cost of plant. We took 12½ per cent of the sum of $46,000 which represents the tangible property.

The build-up of the operating expenses for 1931, namely $14,201.72 includes production $3,270.47, gas purchased $2,302.47; miscellaneous purchases, gas supplies and expenses, $968.00; distribution, $104.94, which includes maintenance of meters, maintenance of distribution, buildings, fixtures and grounds, consisting of labor. General Expense, $4,856.45 made up of general office salaries of $3,700.00, $3,600 of which went to myself and $100. for other stuff for the year.

General expenses also includes general office supplies of $113.10, law expense $479.76, general miscellaneous $49.53 and insurance $491.51. This insurance is for property damage, public liability and compensation.

Maintenance of utility equipment, $22.75, is also included in general expense.

We had a bookkeeper last year which we paid $125. per month; that cost comes out of my salary; I have to pay her. She keeps my own books and also the gas company's books for that money. That is, she is keeping the books of the plumbing shop also. The gas company does not pay her anything as its bookkeeper, that is included in my salary. I am paid $300 a month for management. In 1931, I did not have any labor. I charged the gas company for the labor I performed, that is, the plumbing charge that comes under improvements on the distribution system. The amounts I do not know offhand, it probably amounts to maybe $2,000.00. It is listed under extensions and was paid out of revenues.

For the year 1931, the extent of the improvements was [fol. 144] $147.72 on mains, $493.45 on services—that was not charged to operating expenses, it was an addition to mains and services. I have to do all of the maintenance out of my salary. I did hire help but the help were paid by the Walter Tillman Plumbing Shop out of my salary of $3,600.

Out of my salary of $3,600 as manager, I pay for the maintenance and bookkeeper, any additions I am paid for. I have to take care of capital expenditures or accretions. Outside of the salary paid me by the company as manager and secretary-treasurer, I receive nothing from the company. I own about one eighth or one ninth interest in the company, represented by a preferred stock subscription for 5,000 shares; no, I think it is $10.00 a share for the preferred stock and 500 shares.

The figure which I have given of $21,675.24, as the revenues for 1929, represents the charges and not the actual collections. I do not have with me the amount of actual collections but approximately my best judgment would be $1,000 for bad accounts.

In 1931, the total operating revenue was $15,918.39, representing charges and not collections. My recollection is that of that sum about $700 was left for collection.

We did not have any collection expense in 1931; they came out of my salary. I read the meters but sometimes I have a man to help me; this comes under the $3,600 salary. The man's name is Dan Dobbins; he works for me in my plumbing shop and I pay him 62½ cents per hour.

I do not believe that we paid any Federal Income Tax in 1929 and 1930. Mr. Fritz made that statement up. I am not sure whether we paid any tax or not, I don't know offhand.

Our state and county taxes in 1929 were $11,180.48; in 1931 they were $504.00. I account for the difference because of depreciation.

I cannot give you the assessed value of our property for those years, that is I cannot say exactly, it is in the neighborhood of between $19,000 and $23,000 for 1931, as- [fol. 145] sessed valuation. Those figures were arrived at after deducting for depreciation each year and adding those depreciations. The Citizens Gas Company sells to some county officers. It sells to the county treasurer, Jesse Henderson. He does not own stock in the company. We sell to Tom Anderson, county commissioner. He owns $100 worth of stock in the Citizens Gas Company. Byrne has no stock in the Citizens Gas Company; the county assessor has no stock. We do not sell him.

I think the Great Northern Utilities Company sells to all other county officers. It does not sell gas to Toole County.

Redirect examination:

In figuring my cost of gas per M cubic feet of gas sold for each of the three years, 1929 through 1931, I have taken up as part of the operating expenses of the company the interest on the funded debt, the interest on the floating debt, and miscellaneous deduction due to amortization of franchise. For instance, in 1929, our operating expenses, exclusive of depreciation and taxes amounted to $9,922.77 and our interest on funded debt and miscellaneous deductions for amortization of franchise and organization total $3,360.74; total taxes $1,180.48, so that if I were to give you the figure, the cost of operations for one thousand cubic feet excluding gas purchased, depreciation, interest on funded debt, interest on floating debt and miscellaneous deductions my cost per M cubic feet would be considerably under the figure which I have heretofore given in this record. Our operating revenues in 1929, exclusive of depreciation were $9,922.77, plus $1,180.48; that is exclusive of cost of gas and depreciation but including taxes.

Item 10 of our annual report for the year 1929 which you asked me to look at shows an item of $2,292.84 as cost of production; that is the cost of gas and is included in the sum $9,922.77. So that the record might be straight and because the figures have been given in a miscellaneous fashion, I will verify the operating expenses for 1929:
[fol. 146] Production, cost of gas $2,292.84; distribution $980.24; commercial, $628.72; general $5,637.99; undistributed $382.98; depreciation $5,426.50, taxes $1,180.38, or a total operating expense including cost of gas and depreciation of $16,529.75, showing a net operating revenue of $5,145.49. Those figures just given are correct so that in the year 1929 before I made any deduction from gross income for interest on funded debt and interest on floating debt for amortization of franchise, our revenues and expenses showed a net operating revenue of $5,145.49.

The figures that I have given for the year 1930 as to the cost of operation per M cubic feet of gas sold, exclusive of cost of gas and exclusive of depreciation, also contain these charges, interest on funded debt $2,126.33, interest on floating debt $373.41, miscellaneous deductions for amortization of franchise, $3,186.31, so that to arrive at our cost of operation per M cubic feet, excluding the item of

depreciation and cost of gas, I should also eliminate the interest on the funded debt, interest on floating debt and these miscellaneous deductions.

For the year ended December 31, 1931, I also gave the figure of operating costs per M cubic feet of gas, excluding the item of gas purchased and depreciation, but in computing that figure I did consider as part of the operating expenses interest on the funded debt $1,691.72; interest on the floating debt $54.85; and miscellaneous deductions for amortization of franchise of $1,329. When I said we were in the red in 1931, I meant we were in the red after we made the deductions from the gross income. In 1931 we actually show a net operating revenue of $1,716.67 and in 1930, for the year ended December 31, we also show a net operating revenue, and when I say we were in the red for that year, I meant after deducting the items of interest on the funded debt, floating debt, and miscellaneous deductions [fol. 147] for amortization of franchise. When I said that we are charging 12½ per cent depreciation on real property, I did not mean that literally, I meant physical property—on the piping, meters, regulators. We don't depreciate the real property out where the regulator house is. The regulator house only cost $100. It is a tin shack and we don't own the ground that it stands on.

Recross-examination:

I figured out the cost of gas per M cubic feet and our expenses per M cubic feet from the report. I took the expenses from the report and figured it, divided it into millions of cubic feet of gas used. Our line losses between the well and the town were about five per cent. Previous to that we had it down to about two per cent, that was the Newman well.

The new well has only been in since the middle of July, it is tight. Our accounts are all kept under the supervision of the commission.

Thereupon defendants rested.

Be it further remembered that on the 19th day of September, 1932, and before the evidence and proceedings received and taken before the said Examiner were received in evidence upon the final hearing herein, defendants pre-

sented the objections hereinabove mentioned and each of them to the Court for its rulings thereon and the Court announced that the objections and each of them would be considered and ruled upon by the Court in the decision of the Court upon the merits and final hearing and that exceptions would be duly allowed the defendants to the Court's rulings on the said objections and each of them, and the Court having overruled the said objections of the defendants and each of them in its decision herein upon the merits and final hearing, exceptions were duly allowed to defendants to the Court's rulings on the said objections and each of them.

[fol. 148] That the above and foregoing is all the evidence introduced at the trial of said cause and contains all proceedings had in the trial thereof necessary for a review of the rulings assigned as error on this appeal.

Wherefore the defendants and appellants pray that the above statement of evidence be settled, approved and allowed by the above-entitled Court as a true, full and complete statement of all the evidence taken and given on the trial of said cause, for use on the appeal taken to the Supreme Court of the United States.

Dated at Helena, Montana, this 29th day of November, 1932.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Attorneys for Defendants and Appellants.

Service of the foregoing proposed statement of evidence admitted and receipt of a copy thereof acknowledged this — day of November, 1932.

E. G. Toomey, Gunn, Rasch, Hall & Gunn, Attorneys for Plaintiff and Appellee.

[File endorsement omitted.]

[fols. 149 & 150] In United States District Court

Order Approving Statement of Evidence—Filed Dec. 15, 1932

On this 15th day of December, 1932, came on for consideration the matter of approval of the Statement of Evi-

dence lodged herein by defendants above named, and it appearing to the court that the ten days' notice of this hearing has been given to the plaintiff as required by Equity Rule 75, and it further appearing that the parties hereto have filed their written stipulation herein agreeing that said statement of evidence is a correct statement under paragraph B of Equity Rule 75, and it further appearing that such statement is true, complete, and properly prepared,

It is Ordered by the Court that the same be, and is hereby approved as part of the record herein for the purpose of the defendants' appeal to the Supreme Court of the United States.

Bourquin, Judge.

[File endorsement omitted.]

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Dec. 6, 1934

It is hereby stipulated and agreed by and between E. G. Toomey and Gunn, Rasch, Hall and Gunn, counsel for plaintiff and appellee, and L. A. Foot and Francis A. Silver, counsel for defendants and appellants, that the papers of record which shall constitute the Transcript of Record on Appeal to the Supreme Court of the United States herein shall consist of the following:

1. Bill of Complaint.
2. Motion to Dismiss Bill of Complaint.
3. Answer to Bill of Complaint.

3½. Proposed amendment to bill of complaint and defendants' objections thereto.

4. Minute Entry of Proceedings in the Above Cause on September 19, 1932.
5. Written Opinion of Court filed on October 5, 1932.
6. Findings of Fact and Conclusions of Law filed October 15, 1932.
7. Permanent Injunction Decree or Order issued and dated October 15, 1932.

8. Petition for Appeal.

9. Assignments of Error and Prayer for Reversal.

10. Statement of Basis of Appellate Jurisdiction.

11. Order allowing Appeal.

[fols. 152 & 153] 12. Citation on Appeal and Service Thereon.

13. Statement Under Paragraph 3 of Rule 12 of United States Supreme Court Rules.

14. Statement of Evidence as allowed, approved, and settled.

15. This stipulation.

And the Clerk of the above-entitled court is requested to forward to the Clerk of the Supreme Court at Washington, D. C., only the papers designated herein.

This stipulation is made and entered into pursuant to Rule 10, of the Supreme Court of the United States.

Dated this 5th day of December, 1932.

E. G. Toomey, Gunn, Rasch, Hall and Gunn, Counsel for Plaintiff and Appellee. L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Counsel for Defendants and Appellants.

[File endorsement omitted.]

[fol. 154] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE PROPOSED AMENDMENT TO BILL OF COMPLAINT AND OBJECTIONS THERETO—Filed Dec. 27, 1932

It is hereby stipulated and agreed by and between E. G. Toomey and Messrs. Gunn, Rasch, Hall and Gunn, counsel for plaintiff and appellee, and L. A. Foot and Francis A. Silver, counsel for defendants and appellants, that the proposed amendment to the Bill of Complaint herein, presented to the court by the above-named plaintiff on September 19, 1932, was in words and figures as follows:

"(Title of Court and Cause)

"Plaintiff's Proposed Amendment to Bill of Complaint

"Now comes the plaintiff and alleges as an amendment to its bill of complaint to be designated as paragraph XXI-A and to be inserted after paragraph XXI on page 7, as follows:

"XXI-A

" 'That the rates prescribed by and fixed in said order are insufficient to furnish plaintiff a fair or any return on the value of its gas plant or system and such rates, if made effective, would confiscate and deprive this plaintiff of its property in said gas plant or system, without due process of law, in violation of the 14th Amendment'."

[fol. 155] That the objections to plaintiff's proposed amendment to the Bill of Complaint herein, as orally made in open court on September 19, 1932, by the defendants, were in words and figures as follows, to-wit:

"That defendants, and each of them, object to the amendment offered to the complaint at this time on the grounds and for the following reasons:

"First. The application to amend has not been seasonably made. The matters sought to be introduced by amendment at this time were known to the plaintiff at the time the Bill of Complaint was filed on December 22, 1930, almost two years ago, and at no time up until the present has any application to amend been made.

"We further object to the proposed amendment at this time on the grounds that the amendment, if allowed, would introduce an entirely new cause of action.

"We further object on the grounds that the matters sought to be introduced by the amendment, if allowed, would make an essential change in the character or object of the original suit.

"We further make the objection that plaintiff having failed to make seasonable application for leave to amend and having failed to make any application to amend prior to the taking of evidence herein before the Examiner appointed by the Court, defendants were not at the time of

hearing before the Examiner in a position to meet the new issues which the Bill of Complaint, if amended, would seem to proffer. We went to Shelby without any knowledge that any attempt would be made to introduce evidence as to whether or not the rates prescribed by the Commission would provide a fair return to the utility. And, for the first time, when they sought to introduce evidence on this score we raised an objection.

"And we make the further objection—I have just one paragraph which I would like permission to read; it is alleged here 'that the rates prescribed by and fixed in said order are insufficient to furnish plaintiff a fair or any return on the value of its gas plant or system and such [fol. 156] rates, if made effective, would confiscate and deprive this plaintiff of its property in said gas plant or system, without due process of law, in violation of the 14th Amendment'. We object further on the grounds that the complaint, if amended, would be insufficient and would not state facts sufficient to show that plaintiff is entitled to any relief on the grounds that the rates prescribed would not return a fair rate of return to the plaintiff.

"We further object on the grounds that the manner of stating their objections on confiscation would introduce into the complaint ambiguity, unintelligibilty and uncertainty, and further that there is not set forth in the proposed amendment the claimed rate base, nothing to show operating revenues nor what their operating revenue would be under the prescribed rate, nor their operating costs.

"In other words, it merely sets forth the legal conclusions of the pleader and pleads no facts upon which issue can be taken.

"As further objection to the proposed amendment we maintain plaintiff is estopped to make the amendment sought because it only prays for, in its prayer, as follows: that an interlocutory injunction issue, and so forth, and, quoting: 'enjoining and restraining said defendants from in any manner preventing or interfering with the plaintiff in charging and collecting any rates for gas not discriminatory less than the rates prescribed by said order' " end of quotation. Plaintiff is only asking this Court to enjoin the Commission from interfering with the charging of rates by it which are less than the rates prescribed by our order and therefore it is not in position to raise the question as to

whether or not the top rate or specific rate prescribed by the Commission is confiscatory. The question is hypothetical and moot at this time. It is limited by the case pleaded which does not present a justiciable issue on this score.

"Those are our objections to the proposed amendment at this time."

[fol. 157] That this stipulation is entered into and filed in the above-entitled court and cause in order to fully effectuate the stipulation heretofore filed in said court and cause on the 6th day of December, 1932, relative to the contents of the transcript of record on appeal to the Supreme Court of the United States, and in particular, Item 3½ thereof.

Dated at Helena, Montana, this 27th day of December, 1932.

E. G. Toomey, Gunn, Rasch, Hall and Gunn, Counsel for Plaintiff and Appellee. L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Counsel for Defendants and Appellants.

[File endorsement omitted.]

[fol. 158] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 159 & 160] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed Jan. 14, 1933

Come now the appellants in the above-entitled cause and adopt their assignments of error as their statement of the points to be relied upon and state that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Helena, Montana, January 4, 1933.

Raymond T. Nagle, Attorney General of the State of Montana, residing at Helena, Montana; Francis A. Silver, Counsel Public Service Commission of Montana, residing at Helena, Montana, Attorneys for Appellants.

Service of the above and foregoing statement is hereby admitted and receipt of a copy thereof acknowledged this 4th day of January, 1933.

E. G. Toomey, Gunn, Rasch, Hall and Gunn, Attorneys for Appellee, by M. S. Gunn, of Counsel.

[fol. 161] [File endorsement omitted.]

Endorsed on cover: File No. 37,324. Montana D. C. U. S. Term No. 627. Public Service Commission of Montana, Tom Stout, Thomas E. Carey, et al., etc., appellants, vs. Great Northern Utilities Company. Filed January 14, 1933. File No. 37,324.